Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CARMEN HOOKER ODOM, Secretary of the North Carolina Department of Health and Human Services, *ET. AL.*,
Petitioners,

v.

SAMUEL ANTRICAN, minor; ALANA ANTRICAN, minor, by their next friend Angela Antrican, *ET AL.*
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 7, 2002

90 pp

QUESTION PRESENTED

Whether alleged violations of federal statutes, enacted under the Spending Clause, U.S. Const. art I, § 8, cl. 1, which do not create unambiguous individual rights, are enforceable against state officials by private parties under the doctrine of *Ex parte Young*.

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LIST OF PARTIES TO THE PROCEEDING BELOW

The parties in the court of appeals were as follows:

Carmen Hooker Odom, Secretary of the North Carolina Department of Health and Human Services and Nina M. Yeager, Director of the North Carolina Division of Medical Assistance, were Defendants-Appellants.

Samuel Antrican, minor; Alana Antrican, minor, by their next friend Angela Antrican JeShod Hughes, minor; Emani Tatum, minor, by their next friend Thea Gilbert; Arielle McCree, minor, by her next friend Sherry McCree; Austin Brooks, minor, by his next friend Marty Greer, on behalf of themselves and all others similarly situated, were Plaintiffs-Appellees.

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Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

The Defendants/Petitioners, Carmen Hooker Odom and Nina M. Yeager, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals panel is reported at 290 F.3d 178 and is reprinted at Pet. App. at 1a-20a. The district court's orders denying Defendants' motion to dismiss for lack of subject matter jurisdiction, dated 17 April 2001, and

denying Defendants' motion to amend, dated 10 July 2001, are reprinted at Pet. App. 21a - 37a.

JURISDICTION

The judgment of the court of appeals was entered on 9 May 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 8, clause 1 of the United States Constitution, Spending Clause, the Eleventh Amendment to the United States Constitution; 42 U.S.C.S. §§ 1396a(a)(1), (a)(4)(b), (a)(8), (a)(10) (A) & (B), (23), (a)(30) (A), (a)(43), 42 U.S.C.S. § 1396c, 42 U.S.C.S. § 1396d(r), and 42 U.S.C.S. § 1983 are set forth at Pet. App. 38a - 59a.

STATEMENT OF THE CASE

This petition arises out of Respondents' complaint regarding Petitioners' administration of the Medicaid program for dental care and services in North Carolina. The Fourth Circuit Court of Appeals held that the district court did not err in denying Petitioners' motion to dismiss on grounds of Eleventh Amendment immunity.

This civil action, involving allegations of the violation of federal rights enforceable through 42 U.S.C. § 1983, claims

that Petitioners, two officials of the State of North Carolina, have failed to provide Medicaid-eligible children in North Carolina with Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services as defined in Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* (Medicaid Act), and that they have failed in other respects to meet their alleged obligations under the Medicaid Act and its regulations to Respondents and children like them.

Respondents filed this lawsuit on 9 November 2000, claiming six causes of action under the Medicaid Act. They claim their rights under the act have been violated, that the provisions at issue are enforceable against Petitioners through 42 U.S.C. § 1983, and that federal jurisdiction exists under 28 U.S.C. § 1331.

Respondents are six children under age 21, some of whom are eligible for Medicaid benefits.[1] They allege that Petitioners, the Secretary of the North Carolina Department of Health and Human Services and the Director of the Division of Medical Assistance, in their official capacities, deny certain benefits to children under the state's Medical Assistance program (Medicaid). Respondents claim that they have a federal cause of action against Petitioners for prospective injunctive relief to enforce their rights under Medicaid.

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[1] Respondents Antrican, neither having been eligible for Medicaid when the complaint was filed nor since, were dismissed as plaintiffs subsequent to the decision below.

Medicaid is a jointly funded federal-state program established by Congress under its Spending Power for the purpose of enabling the states, as far as practicable under the particular conditions in each state, to furnish medical assistance and other related services to indigent individuals. States participate in the Medicaid program through "state plans" which are submitted to, and approved by, the Secretary of the United States Department of Health and Human Services.

Respondents' complaint consists of six counts: (1) equal access under 42 U.S.C. § 1396a(a)(30(A); (2) statewide availability under 42 U.S.C. § 1396a(a)(1); (3) reasonable promptness under 42 U.S.C. § 1396a(a)(8); (4) free choice under 42 U.S.C. § 1396a(a)(23) ; (5) comparable care under 42 U.S.C. § 1396a(a)(10)(B); and (6) EPSDT services. EPSDT is a group of specific services defined under 42 U.S.C. §§ 1396a(a)(43) and 1396d(r) available to Medicaid recipients under age 21. Respondents seek as relief, among other things, an injunction requiring Petitioners "to make needed dental services immediately available to Medicaid beneficiaries in their respective localities."

On 4 January 2001 Petitioners filed a motion to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure on the grounds that Respondents failed to allege any facts establishing that Petitioners were violating any particular Medicaid provision, that Respondents were not injured by any violation of the Medicaid Act, that in any event the statutes and regulations Respondents relied upon did not create a private

cause of action under 42 U.S.C. § 1983, and that the claims against Petitioners were barred by the Eleventh Amendment.

On 17 April 2001 the District Court issued an order denying the motion to dismiss for lack of subject matter jurisdiction, and further denying Petitioners' motion to dismiss for failure to state a claim as to five of Respondents' six claims. Respondents' claim under 42 U.S.C. § 1396a(a)(23) was dismissed, and Respondents did not appeal that ruling.

Petitioners appealed to the Fourth Circuit Court of Appeals on 9 May 2001. On 9 May 2002, the Court of Appeals issued its judgment and opinion, affirming the District Court's 17 April 2001 order denying Petitioners' motion to dismiss.

REASONS FOR GRANTING THE WRIT

This case raises important, recurring questions relating to the jurisdiction of federal courts to enforce the provisions of spending power legislation against state officials under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

I. The decision below is in conflict with that of another circuit as to an important recurring issue of federal law under the Medicaid Act: whether EPSDT provisions are enforceable under the doctrine of *Ex parte Young*.

As this Court recently has observed, there has been confusion in the lower federal courts due to some imprecise

language in this Court's past § 1983 jurisprudence. *Gonzaga Univ. v. Doe*, 122 S. Ct. 2268, 2275, 2002 U.S. LEXIS 4649 at * 18-19 (2002). This "confusion" has carried over into the scope of litigation permitted under the *Ex parte Young* doctrine. As a result, there is a split among the circuit courts on the question raised in this action about the enforcement of rights alleged to have been created in the Medicaid Act in general, and the EPSDT statute in particular. Compare the decision below (holding *Ex parte Young* permits actions under § 1983 to enforce EPSDT and other Medicaid Act claims) and *Westside Mothers*, 289 F.3d 852 (2002) (6th Cir. 2002) (holding *Ex parte Young* permits actions under § 1983 to enforce EPSDT claims) with *Frazar v. Gilbert*, 2002 U.S. App. LEXIS 14885 (5th Cir. decided July 24, 2002) (holding that because EPSDT creates no federal rights, it cannot be the basis for an action under the *Ex parte Young* doctrine).

In *Westside Mothers* the Sixth Circuit held that because the plaintiffs were only seeking prospective injunctive relief against state officials for those officials' alleged violations of federal Medicaid law, the district court had jurisdiction over the claims under *Ex parte Young*. 289 F.3d at 862. Significantly, the Sixth Circuit determined the *Ex parte Young* jurisdictional issue *before* addressing the question whether there is a private right of action under § 1983 for an alleged violation of the EPSDT provisions of the Medicaid Act. In this case, the Fourth Circuit did not find it necessary, despite Petitioners' urging, to even *question* whether the provisions of the Medicaid Act at issue create rights enforceable through § 1983. The Fourth Circuit implicitly concluded that a bare allegation

of failure to comply with a federal statutory provision is all that *Ex parte Young* requires to overcome a state's immunity and dignity interest. Petitioners respectfully submit that these results are "confused," in that they put the *Young* cart before the *Ex parte* horse.

In *Frazar* the Fifth Circuit engaged in a more thoughtful analysis and held that if plaintiffs fail to allege a violation of a federal right, there is no basis for federal court jurisdiction under the *Ex parte Young* doctrine. In *Frazar* the Fifth Circuit properly looked to prior guidance from this Court, and found in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*") this Court's observation that: "[T]he *Young* doctrine rests on the need to promote the vindication of federal rights." 465 U.S. at 105. Then, after subjecting the alleged statutory violations to a proper analysis under the standard set forth in *Blessing v. Freestone*, 520 U.S. 329 (1997), the Fifth Circuit concluded the district court had not enforced any violation of the EPSDT provisions of the Medicaid Act which are actionable under § 1983. For this reason, the Fifth Circuit correctly concluded that the district court had improperly exercised jurisdiction under the *Ex Parte Young* doctrine. *Frazar*, 2002 U.S. App. LEXIS 14885, at * 50. There being no federal right or interest at issue sufficient to justify overriding the state's Eleventh Amendment immunity, the doctrine of *Ex Parte Young* did not support federal jurisdiction.

Petitioners contend the *Frazar* result focuses on the issues in a proper sequence. Federal courts should ask first, is

there a federal right involved such that the principles of federal supremacy at the core of the *Ex parte Young* exception to Eleventh Amendment immunity come into play? Then, if the answer to the first question is yes, courts should proceed to perform traditional *Ex parte Young* analysis:

> In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'

Verizon Maryland Inc. v. Public Service Commission of Maryland, 535 U.S.__ ,122 S. Ct. 1753, 1760, 152 L. Ed. 2d 871, 882 (2002) (citation omitted). To be sure, that inquiry can become more complex: Is there any special sovereignty interest at issue notwithstanding the alleged violation of rights? (*see Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997)); Are the proper state officials before the court? (*see Lytle v. Griffith*, 240 F.3d 404 (4th Cir.2001)); Is the relief requested truly prospective and of an equitable nature? (*see DeKalb County Sch. Dist. v. Schrenko* 109 F.3d 680, 691 (11th Cir.), *cert. denied*, 522 U.S. 1015 (1997)), to mention a few.

Clearly, the decisions of the Fifth Circuit and of the Fourth and Sixth Circuits are in conflict on the question of whether federal EPSDT provisions can be enforced by federal courts at the behest of private parties under the *Ex parte Young*

doctrine. More importantly, however, they are in conflict on the broader issue of whether it is constitutionally proper to resolve questions about the applicability of *Ex parte Young* to alleged violations of federal statutory provisions without first determining whether the alleged violations are of unambiguous individual rights.

The decision below erroneously concluded that the district court had jurisdiction under *Ex parte Young* to hear the claims against Petitioners. Specifically as regards the EPSDT provisions of the Medicaid Act, and more broadly as regards the proper application of *Ex parte Young*, the decision below conflicts with that of the Fifth Circuit, and only this Court can clarify these important areas of federal law.

II. At least for statutory provisions that fail to create unambiguous individual rights, there is no federal supremacy interest in private enforcement of the Medicaid Act sufficient to justify application of the *Ex parte Young* exception to Eleventh Amendment immunity.

A. *Ex parte Young* is a narrow exception to Eleventh Amendment immunity.

It is clear that when a private party sues a state or one of its agencies or departments as a defendant, the action is proscribed by the Eleventh Amendment regardless of the nature of the relief sought, unless the state's immunity has been abrogated by Congress or waived by the State itself. *Pennhurst*

II, 465 U.S. at 100. However, the doctrine of *Ex parte Young* is widely cited for the proposition that the Eleventh Amendment does not bar private parties from suing state officials in federal court when the relief they seek can be deemed to be prospective injunctive relief, even when the state itself and it agencies are immune from the suit. As this Court explained in *Ex parte Young*:

> If the act which the state [official] seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159-60.

As a judicially-created "narrow exception" to the states' constitutional sovereign immunity from private-citizen suits in federal courts, *Seminole Tribe v. Florida,* 517 U.S. 44, 76 (1996), the *Ex parte Young* fiction is not given "an expansive interpretation." *Pennhurst II,* 465 U.S. at 102. For example, it does not apply to statutory rights when Congress provides its own remedial scheme:

> Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Seminole Tribe, 517 U.S. at 74.

The decision below applied the test from *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990) to Petitioners' claim that the congressional Medicaid remedy precludes an *Ex parte Young* action. This was error, because the *Wilder* test applies to a different question entirely: whether Congress intended by its statutory remedy to preclude an action brought under 42 U.S.C. § 1983. The *Seminole Tribe* test looks not to whether Congress intended to foreclose a § 1983 remedy; rather, it properly focuses on whether the federal supremacy interest in the statute is adequately protected in the remedy provided in the statute itself.

The *Ex parte Young* fiction also does not apply when the right at issue conflicts with a special state sovereignty interest. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Clearly, were *Ex parte Young* to be construed to allow jurisdiction in federal court in every case where prospective injunctive relief is sought against a state officer, courts would merely adhere to an "empty formalism" which would undermine the principle that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question

jurisdiction. *Id.* at 270. And, although this Court has noted that so long as injunctive relief has only an ancillary effect on a state's treasury, the Eleventh Amendment is not violated by an order that is costly for a State to implement, *see, e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), an order to state officials to "spend more money" would surely not be "ancillary" to any proper equitable relief, and would run afoul of the Eleventh Amendment.

B. The *Ex parte Young* fiction exists only to vindicate federal supremacy interests.

The "fiction" of *Ex parte Young* was created to "give[] life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). Prospective relief of the sort awarded in *Ex parte Young* does just that. The doctrine of *Ex parte Young* is only justified by the need for federal courts sometimes "to vindicate the federal interest in assuring the supremacy" of federal law. *Id.* However, this Court has long recognized that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst II*, 465 U.S. at 105.

It is the need to enforce the federal interest in the supremacy of federal law, and nothing more, that justifies the exercise of Article III jurisdiction under *Ex parte Young*, not the personal interests of any particular plaintiffs. Thus, whenever the withholding of federal funds by the federal government is sufficient to protect the federal supremacy interest in the operations of a federally-induced state program,

such as Medicaid, there is no justification for a court to use the fiction of *Ex parte Young* to override a state's Eleventh Amendment immunity. Petitioners contend that enforcement by private plaintiffs of spending power statutes under which states create social welfare programs is not necessary to vindicate the federal supremacy interest in those programs.

However, when the federal government itself seeks to enforce a spending power enactment against a state, a wholly different situation exists with regard to federal supremacy considerations, not the least of which is that the Eleventh Amendment is not implicated in that situation.

C. Spending clause legislation is not coercive and generally does not secure rights for anyone.

The legal relationship formed between a state and the federal government when a spending power program is implemented by a state was described by this Court in *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981) ("*Pennhurst I*"), as being in the nature of a contract. The relevant passage reads:

> Unlike legislation enacted under § 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is *much in the nature of* a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of

> Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of this "*contract.*"

Pennhurst I, 451 U.S. at 17 (emphasis added). Justice Scalia has discussed the contractual nature of the relationship, explaining that the relationship is "in the nature of a contract" because:

> The State promises to provide certain services to private individuals, in exchange for which the Federal Government promises to give the State funds. In contract law, when such an arrangement is made (A promises to pay B money, in exchange for which B promises to provide services to C), the person who receives the benefit of the exchange of promises between two others (C) is called a third-party beneficiary.

Blessing, 520 U.S. at 349 (Scalia, J., concurring).

Under this Court's decision in *In re Ayers*, 123 U.S. 443 (1887), which was discussed at length and relied upon in *Ex parte Young*, and which was reaffirmed in *Idaho v. Coeur d'Alene Tribe* and *Alden v. Maine*, 527 U.S. 706 (1999), a state official is not stripped of Eleventh Amendment immunity when a claim against him seeks specific performance of a contract. *In re Ayers* held that in such actions, the state itself is the only

real party-in-interest. Therefore, federal courts have no jurisdiction over the state officer, and the bar of state sovereign immunity is not overcome by naming the state officer as a defendant. *In re Ayers*, 123 U.S. at 490-92, 497-98.

The contractual and conditional nature of funding statutes is why such statutes have low federal supremacy interests and why states are not bound by ambiguous provisions in them, even *vis a vis* the federal government. If Congress desires to impose conditions on a state's receipt of federal funds, it must do so unambiguously. This "clear statement" requirement is a substantive limitation on Congress' use of the spending power, and a state is not deemed to knowingly accept conditions of which it is unaware. *Pennhurst I*, 451 U.S. at 17; *see also Suter v. Artist M.*, 503 U.S. 347, 356 (1992). In the context of a claim by an individual against a state official in federal court, no judicial inquiry about an "implied" cause of action can surmount the *Pennhurst I* clear-statement requirement. At a minimum, then, as applied to statutory claims, *Ex parte Young* must be restricted to enforcing the federal supremacy interest in unambiguous legislative conditions.

Furthermore, as with other spending power legislation, nothing in the Medicaid Act obligates a state to do anything. On its face, it is optional. The requirements of legislation enacted under the Spending Clause are not binding upon a state unless there is a mutual agreement between the state and the federal government. Such a statute is not coercive, and unless agreed to by a state, compels nothing of it. Therefore, the

"compulsion" of spending clause statutes derives not from their enactment, but from their acceptance by the states. One district court has put it this way:

> To be sure, the States must comply with Medicaid . . . participation requirements in order to continue to receive federal funds. But the authority to require compliance with participation standards is derived not from the primacy of federal law enacted pursuant to an enumerated power but from the terms of a contract and the agreement to abide by those terms in return for the receipt of federal moneys.

Brogdon v. National Health Care Corp, 103 F. Supp. 2d 1322, 1339 (N.D. Ga. 2000).

Under Medicaid, states choose whether to participate. If a state were to choose not to participate, no federal agency would step in and institute a Medicaid program in that state. Even if a state elects to participate, there are many optional services under the federal statutory blueprint. If a state elects not to provide for such optional services, no federal agency will step in and provide them. If a state elects to participate and federal oversight officials disapprove of how the state administers its program, no federal agency will step in, displace the state officials and run the program for the state. Instead, in the Medicaid Act Congress expressed its understanding that it is sufficient enforcement of the federal supremacy interest for

federal funding to be withheld. *See* 42 U.S.C. § 1396c (2001) (Pet App. at 55a). It is the "stick" of losing federal funds that prevents the states from operating their Medicaid programs as they see fit.

Statutes such as these, having no obligatory force of their own, can only rarely, if ever, carry a sufficient federal supremacy interest to justify private enforcement against unconsenting state officials. The statutes at issue in the decision below carry no such interest.

D. The federal supremacy interest in a statute under which "substantial compliance" is satisfactory is not sufficient to overcome a state's Eleventh Amendment immunity.

Unlike the individually-focused terminology of statutes such as Titles VI of the Civil Rights Act and IX of the Education Amendments of 1972, the Medicaid Act speaks only to the requirements for the contents of state plans for those states choosing to participate in Medicaid. Moreover, Medicaid focuses on the services for which participating states will pay, rather than the needs of any particular person. Of still greater significance is the fact that under the congressional remedy there is no necessary penalty for states that only "comply substantially" with the Act. *See* 42 U.S.C. § 1396c(2) (2001) (Pet. App. at 55a). Such a statutory scheme, which merely requires "substantial compliance," does not create rights. *Cf. Blessing*, 520 U.S. at 340-43 (finding statutory yardsticks for measuring system-wide performance not to

create individual entitlements). Because the statutes upon which Respondents rely contain no rights-creating language; have an aggregate, not individual, focus; serve primarily to direct the distribution of public funds to participating states; and compel only "substantial compliance," they do not create rights enforceable under § 1983. *Gonzaga*, 122 S. Ct. at 2279, 2002 U.S. LEXIS 4649, at *33. And they carry insufficient federal supremacy interests to warrant the judicial displacement of a state's Eleventh Amendment immunity.

In particular, Petitioners contend the very fact that 42 U.S.C. § 1396d(r) directs the setting of a yearly *federal goal* of something less than 100% participation is determinative both on the issue of whether Congress intended Medicaid recipients to have individual rights under EPSDT, as well as on the issue of whether an action under *Ex parte Young* is necessary to vindicate the federal supremacy interest in reaching the goal, whatever that interest might be. The only way the promotion of the supremacy of federal law can be "accommodated to the constitutional immunity of the states" in such cases is to leave enforcement decisions in federal hands, not in the hands of private litigants.

E. The United States has ample power to enforce federal supremacy interests in spending power legislation.

Congress has retained power under 42 U.S.C. § 1396c to vindicate federal supremacy interests against states whose Medicaid plans do not comply with the provisions of § 1396a,

or which fail to substantially comply with any provision of § 1396a. Congress provided for no power to *compel* compliance with any particular Medicaid requirement. Petitioners urge this Court to consider the congressional remedy of withholding federal funds to be sufficient to vindicate any federal interest in how Petitioners administer North Carolina's Medicaid program. Where the federal interest has been amply protected by Congress, the need to rely on the *Ex parte Young* fiction simply is not present. *See Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001) (holding statutory provisions for reducing and recapturing funds under Titles IV and XX of the Social Security Act preclude *Ex parte Young* enforcement action).

In *Suter* this Court suggested that the provision for termination of funding in a statutory program enacted under the Spending Power might foreclose remedies by private plaintiffs. 503 U.S. at 360-61 nn.11-12. This Court observed that so long as the federal government can enforce its program requirements using the carrot and stick of federal funds, those requirements are not unenforceable. *Id.* Later, in *Seminole Tribe*, this Court upheld the state's Eleventh Amendment immunity to a statutory claim because of the remedial scheme within the statute at issue. The Medicaid Act's remedial enforcement provision is both far more limited than that which district courts might order under *Ex parte Young*, and it is adequate to protect the federal supremacy interest in how federal funds are used in a federal-state cooperate program.

In brief, the existence of a congressional remedy in the Medicaid statute should preclude the use of *Ex parte Young* to

enforce the statutory scheme by other means. If state officials could be sued by private parties under the authority of *Ex parte Young*, the limited congressional sanction would be of little import. The Medicaid Act provides its own specific remedy that may be used against any non-compliant participating state. Accordingly, the *Ex parte Young* doctrine is not needed to vindicate whatever federal supremacy interest there may be in the administration of the Medicaid program.

It is also for the executive branch, not private litigants, to decide whether a state has deviated so far from the conditions attached to federal funds that some enforcement action is required. In this regard it bears noting that the United States claims the inherent power to sue to enforce conditions imposed on the recipients of federal grants, including the states. *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002); *United States v. Marion County Sch. Dist.*, 625 F.2d 607, 609-11 (5th Cir. 1980) (United States may bring contract action to compel fund recipients to comply with federal funding conditions). Under these circumstances, the federal government has both the incentive and the means to vindicate whatever federal supremacy interest *it* believes exists in a spending power program. That should be enough.

Petitioners urge this Court to grant their petition to clarify and re-emphasize for the lower courts the limitations inherent in *Ex parte Young*, especially when they are presented with claims under statutes such as the Medicaid Act. As this Court said in *Alden*:

> If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

527 U.S. at 751.

CONCLUSION

This case raises important questions of federal law and State-Federal relationships that should be settled by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,
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August 7, 2002

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APPENDIX

APPENDIX

Published Opinion of the United States Court of Appeals for the Fourth Circuit, Decided May 9, 2002 ..... 1a

Order (Denying Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction), dated April 17, 2001 ... 21a

Order (Denying Defendants' Motion to Amend), dated July 10, 2001 ..... 37a

Const. Art. I, § 8, Cl 1 (2002) 38a

U.S. Const. Amend XI 39a

42 U.S.C.S. § 1396a(a)(1) (2001) 40a

42 U.S.C.S. § 1396a(a)(4)(B) (2001) 41a

42 U.S.C.S. § 1396a(a)(8) (2001) 42a

42 U.S.C.S. §§ 1396a(a)(10)(A) & (B) (2001) 43a

42 U.S.C.S. § 1396a(a)(23) (2001) 50a

42 U.S.C.S. § 1396a(a)(30)(A) (2001) 52a

42 U.S.C.S. § 1396a(a)(43) (2001) 53a

42 U.S.C.S. § 1396c (2001) 55a

42 U.S.C.S. § 1396d(r)(2001) 56a

42 U.S.C.S. § 1983 (2001) 59a

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED MAY 9, 2002

[Caption Omitted in Printing]

OPINION

NIEMEYER, Circuit Judge

Several North Carolina Medicaid beneficiaries commenced this class action under 42 U.S.C. § 1983 against North Carolina State officials to obtain (1) a declaratory judgment that dental screening and treatment services provided to minors in North Carolina under the Medicaid program are inadequate and fail to comply with the requirements of the Medicaid Act and (2) an injunction requiring the State officials to comply with the Medicaid Act by making dental screening and treatment promptly available. The district court, relying on *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), denied the North Carolina State officials' motion to dismiss based on Eleventh Amendment immunity. The court also rejected the officials' other jurisdictional challenges. [**3] On this interlocutory appeal, we affirm the district court's ruling on Eleventh Amendment immunity, and we decline to exercise pendent appellate jurisdiction over the other grounds on which the State officials relied to support their motion to dismiss the complaint.

I

The plaintiffs, who are minors, allege in their complaint that they have been denied the dental care prescribed by Title XIX of the Social Security Act, known as the "Medicaid Act." Noting that only 16% of North Carolina's dentists participate in the Medicaid program, they allege that they are unable to locate local dentists who are willing to treat them in exchange

for Medicaid reimbursement. They assert that Medicaid beneficiaries in North Carolina generally must conduct extensive searches and travel long distances to locate and utilize the services of a dentist who will accept Medicaid reimbursement.

Describing their own experiences, Emani Tatum, 3, alleges that she has had to travel two hours each way to utilize the services of a dentist. While a dental clinic closer to her provided an initial screening, that clinic was unable to provide ongoing care. As a result of the inaccessibility of prompt and adequate care, [**4] she has had to have extensive dental care, including three fillings and two crowns. JeShod Hughes, 9, alleges that he has had similar difficulties in obtaining treatment. Arielle [*183] McCree, 6, alleges that her mother contacted the local Department of Social Services to find a dentist, only to be referred to the public health clinic, which was unable to provide dental services. The Department of Social Services then could not provide the name of any dentist for McCree who would accept Medicaid reimbursement. McCree's mother eventually located a dentist an hour away. Austin Brooks, 6, alleges that his grandmother contacted numerous dentists in his area, but none would accept Medicaid. Because he could not locate a dentist in his area, he could not receive preventive dental treatment. When he began experiencing oral pain, his grandmother located a dentist three hours away. Because of the lack of preventative dental care, Brooks has had to have four of his front teeth pulled and several of his remaining teeth capped. n1

n1 With respect to the two Antrican plaintiffs, the parties agree that they are not presently eligible for benefits under the Medicaid program and that they will be

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dismissed from this action.

[**5]

Because of their inability to receive adequate dental care, these plaintiffs, through their parents, guardians, or next friends, commenced this action on behalf of themselves and on behalf of others similarly situated against Carmen Hooker Buell, Director of the North Carolina Department of Health and Human Services, and Nina M. Yeager, Director of the North Carolina Division of Medicaid Assistance, in their official capacities. n2 Plaintiffs allege that the defendants have: (1) denied North Carolina Medicaid beneficiaries equal access and quality care, in violation of 42 U.S.C. § 1396a(a)(30)(A) and 42 C.F.R. § 447.204; (2) failed to ensure statewide availability of dental services, in violation of 42 U.S.C. § 1396a(a)(1) and 42 C.F.R. § 431.50; (3) denied North Carolina Medicaid beneficiaries timely dental care, in violation of 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930; (4) denied Medicaid beneficiaries a free choice of dental care providers, in violation of 42 U.S.C. § 1396a(a)(23) and 42 C.F.R. § 431.51 [**6] ; (5) denied Medicaid beneficiaries dental care that is comparable to the care available to non-Medicaid patients, in violation of 42 U.S.C. § 1396a(a)(10)(B) and 42 C.F.R. 440.230§ § , 440.240; and (6) denied Medicaid beneficiaries proper access to early screening and treatment services, in violation of 42 U.S.C. 1396a(a)(10)(A)§ § , 1396a(a)(43), 1396d(a)(4)(B), 1396d(r), and 42 C.F.R. § 441.50 *et seq.*

n2 North Carolina has chosen to participate in the federal Medicaid program and, therefore, agrees to follow the requirements of the Medicaid Act and accept federal funding for its Medicaid program. N.C. Gen. Stat. Ann. § 108A-56. Buell and Yeager are the North Carolina

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officials charged with administering the North Carolina Medicaid program.

Generally, the Medicaid Act provides conditional federal financial assistance to states that choose to participate in the Medicaid program. *See* 42 U.S.C. § 1396 *et seq*. The purpose of the program is to enable states "to furnish ... medical assistance on behalf of families with dependent children ... whose income and resources are insufficient to meet the costs of necessary medical services," and funds are available to "States which have submitted, and had approved by the Secretary [of the United States Department of Health and Human Services], State plans for medical assistance." 42 U.S.C. § 1396. States are not required to participate in the Medicaid program, but if they choose to participate, and succeed in having their plans approved by the Secretary, they must implement and operate Medicaid programs that comply with detailed federally mandated standards. *See* 42 U.S.C. § 1396a. If a participating State fails to comply with federal standards, the Secretary may withhold federal funding from the State until it brings its plan back into compliance with those standards. *See* 42 U.S.C. § 1396c.

[**7]

For relief, the plaintiffs request (1) a judgment declaring that "the Defendants' [*184] failure to insure the availability of dental services violates Plaintiffs' rights under the Social Security Act ... and its implementing rules and regulations" and (2) an injunction requiring the defendants to "make needed dental services immediately available to Medicaid beneficiaries in their respective localities" and

requiring the defendants "to comply with the Federal statutes, rules, and regulations" governing Medicaid programs.

The North Carolina officials filed a motion to dismiss the plaintiffs' complaint, asserting Eleventh Amendment immunity, a lack of standing, and the failure of the complaint to state a claim under 42 U.S.C. § 1983 upon which relief can be granted. From the district court's order denying their motion, the North Carolina officials filed this interlocutory appeal, challenging the district court's ruling denying them Eleventh Amendment immunity. They also ask this court to exercise pendent appellate jurisdiction over the other rulings made by the district court.

II

The district court's order denying State officials Eleventh Amendment immunity is [**8] an immediately appealable order, *see Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993), and our review of this order is *de novo*, *see CSX Transp., Inc. v. Bd. of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998).

The North Carolina officials contend that, because they have been sued in their official capacities, they are entitled to sovereign immunity under the Eleventh Amendment to the Constitution. They argue that the exception to such immunity, described in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), is not applicable.

The *Ex Parte Young* exception to Eleventh Amendment immunity is designed to preserve the constitutional structure

established by the Supremacy Clause. Thus, it allows private citizens, in proper cases, to petition a federal court to enjoin State officials in their official capacities from engaging in future conduct that would violate the Constitution or a federal statute. *See Ex Parte Young*, 209 U.S. at 159 (enjoining enforcement of a State statute found to violate the U.S. Constitution); *Green v. Mansour*, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985) [**9] (applying *Ex Parte Young* to an action involving State violation of a federal statute). This exception to sovereign immunity is based on the notion, often referred to as "a fiction," that a State officer who acts in violation of the Constitution is "stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Ex Parte Young*, 209 U.S. at 160. A State officer acting in violation of federal law thus loses "the 'cloak' of State immunity," *Bragg v. West Virginia Coal Mining Ass'n*, 248 F.3d 275, 292 (4th Cir. 2001), *cert. denied*, 151 L. Ed. 2d 885, 122 S. Ct. 920 (2002), because in such a situation, "the State has no power to impart to [the official] any immunity from responsibility to the supreme authority of the United States." *Ex Parte Young*, 209 U.S. at 160.

But "just because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection." *Bell Atlantic Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 294 (4th Cir. 2001), [**10] *cert. granted sub nom. Verizon Md. v. Pub. Serv. Comm'n*, 533 U.S. 928, 121 S. Ct. 2548, 150 L. Ed. 2d 715 (U.S. June 25, 2001) (No. 00-1531), [*185] *and Verizon Md. v. Pub. Serv. Comm'n*, 121 S. Ct. 2548 (U.S. June 25, 2001) (No. 00-1711). "Such 'empty formalism' would

improperly sacrifice the 'real interests served by the Eleventh Amendment.'" *Id.* (quoting *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 270, 138 L. Ed. 2d 438, 117 S. Ct. 2028, (1997)). As we explained in *Bell Atlantic Md.*, in applying the *Ex Parte Young* exception to Eleventh Amendment immunity, we must evaluate the respective State and federal interests, applying *Ex Parte Young* narrowly "so as not unduly to erode the important underlying doctrine of sovereign immunity" while still protecting the supremacy of federal law. *Bell Atlantic Md.*, 240 F.3d at 294.

Arguing that this case traverses the narrow limits of the *Ex Parte Young* exception in several respects, the North Carolina officials assert that the exception does not apply because: (1) this suit requires expenditures of money from North Carolina's treasury and therefore the injunctive relief requested is not actually prospective; [**11] (2) the plaintiffs have not alleged an ongoing violation of federal law; (3) the law that plaintiffs allege has been violated is State law, not federal law; (4) the Medicaid Act was adopted under the Spending Clause and implemented through the voluntary participation of the States, making its prerequisites unenforceable under the Supremacy Clause -- the fundamental reason for the *Ex Parte Young* exception; (5) the plaintiffs' action is actually against the State and not against the individuals and, in any event, violates the State's special sovereignty interests; (6) application of the *Ex Parte Young* exception would alter the remedial scheme explicitly selected by Congress to enforce the Medicaid Act; and (7) the rights that plaintiffs seek to enforce are discretionary in nature, not ministerial, and therefore are not subject to the *Ex Parte Young* exception.

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We address, in turn, each of the reasons advanced by the North Carolina officials for not applying the *Ex Parte Young* exception to Eleventh Amendment immunity.

A

The North Carolina officials contend first that this action does not fall within the *Ex Parte Young* exception because the type of relief sought [**12] is, at its core, not truly prospective. They assert that, while the plaintiffs phrase their request in terms of prospective injunctive relief, they actually seek an order directing the State to raise the Medicaid reimbursement rates paid to participating dentists, thereby adversely affecting the State's treasury. In response, plaintiffs point out that, although raising rates may be a method for inducing more dentists to participate in the Medicaid program, the plaintiffs' complaint does not demand a particular methodology. Rather, it simply "requests injunctive relief to require the state officials to take steps to comply with a number of separate and varied Medicaid provisions."

We believe that the issue, as framed by the parties' positions, does not properly focus on the relevant question. It is true, as both parties acknowledge, that, as an exception to Eleventh Amendment immunity, *Ex Parte Young* actions must seek only prospective injunctive relief. But simply because the implementation of such prospective relief would require the expenditure of substantial sums of money does not remove a claim from the *Ex Parte Young* exception. *Ex Parte Young* "permits federal courts [**13] to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken v. Bradley*, 433 U.S. 267, 289, 53 L. Ed. 2d

745, [*186] 97 S. Ct. 2749 (1977); *cf. Edelman v. Jordan*, 415 U.S. 651, 668, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974) (reversing a retroactive award of monetary relief because "it [was] in practical effect indistinguishable in many aspects from an award of damages against the State"). Thus, the focus on an injunction's impact on the State's treasury is misdirected. Rather, the proper focus must be directed at whether the injunctive relief sought is prospective or retroactive in nature.

This distinction comes from the Supreme Court's holdings in *Edelman* and *Milliken*. In *Edelman*, the Supreme Court determined that the relief sought infringed on sovereign immunity under the Eleventh Amendment because the plaintiffs sought a *retroactive* payment of benefits that were found to have been wrongfully withheld from proper recipients. 415 U.S. at 668. In the later-decided *Milliken* case, however, the Court upheld an injunction [**14] entered in a school desegregation case that ordered the State to pay one half of the costs attributable to certain educational programs ordered as part of a desegregation decree. The Court found that "the decree ... fit[ ] squarely within the prospective-compliance exception reaffirmed by *Edelman*. That exception ... permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken*, 433 U.S. at 289. Thus, our inquiry must focus, not on whether the injunctive relief sought would have an impact on the State treasury, but on the prospective-retroactive distinction as delineated by *Edelman* and *Milliken*.

We conclude that the relief sought in this case is prospective in nature and, therefore, is of the type that falls within the *Ex Parte Young* exception. The plaintiffs requested

an injunction mandating that in the future, State officials bring the North Carolina Medicaid program into compliance with the Medicaid Act. This mandate might potentially impact the State treasury, but it is nonetheless prospective.

B

The North Carolina [**15] officials next contend that plaintiffs' suit has failed to allege an *ongoing or continuing* violation of federal law, as is necessary to invoke the *Ex Parte Young* exception. These officials maintain that "each plaintiff, according to the complaint, is currently a Medicaid recipient who is receiving dental treatment by a dentist or clinic that accepts Medicaid patients at the current Medicaid reimbursement rate" and that, therefore, even though violations may have occurred in the past, they are not ongoing.

While the North Carolina officials correctly note that the *Ex Parte Young* exception requires the allegation of an ongoing violation of federal law, *see Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 281 (1997), their argument misreads the substance of the plaintiffs' complaint. The plaintiffs do not rest their complaint on any claim that they have been entirely unable to find dentists in North Carolina who will accept Medicaid reimbursement or that they have not received some treatment. Rather, they claim that North Carolina has failed, and continues to fail, to operate a Medicaid program under which beneficiaries can "obtain prompt and adequate dental services" [**16] on an ongoing basis, as would be available to the general population. They allege that because a large proportion of dentists do not participate in the Medicaid program, beneficiaries, such as themselves, have to travel long distances to find Medicaid-participating [*187] dentists. If

true, these claims allege ongoing violations of: 42 U.S.C. § 1396a(a)(30)(A), requiring States to "provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan as ... *are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population* in the geographic area" (emphasis added); and 42 U.S.C. § 1396a(a)(8), requiring States to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished *with reasonable promptness to all eligible individuals*" (emphasis added). We thus conclude that the plaintiffs' complaint is not defective for failing to allege ongoing violations [**17] of federal law.

C

In the same vein, the North Carolina officials assert that this action seeks to enforce *State* law, not *federal* law. They contend that this action seeks to challenge the State's participation in the Medicaid program and not to vindicate the supremacy of federal law, arguing that "merely because a State enacts a program that complies with federal guidelines or requirements, the program's requirements do not thereby become or constitute federal law for purposes of *Ex Parte Young*." For support, the North Carolina officials rely on our decision in *Bragg*, 248 F.3d 275, where we held that private parties could not bring an *Ex Parte Young* action against State officials seeking to compel their compliance with surface mining regulations because the directly applicable standards were supplied by West Virginia law.

Again, the North Carolina officials correctly observe that the *Ex Parte Young* exception does not apply to actions against State officials seeking to compel their compliance with *State* law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) ("We conclude [**18] that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law"); *Bragg*, 248 F.3d at 295-96. In *Bragg*, for instance, West Virginia State officials were sued under the Surface Mining Control and Reclamation Act of 1977. That Act permits states, such as West Virginia, to enact their own laws and thus obtain "primacy" status. Under the Surface Mining Act, a State with primacy status has *exclusive* control over the regulation of surface mining, so long as the State law fulfills minimum national standards. 248 F.3d at 293-94. We concluded that in that context "any injunction against State officials to enforce this provision would command them to comport with the State's own law, not federal law, because only the State law [was] operative and directly regulated the issuance of [mining] permits." *Id.* at 296. Therefore, in that context, the *Ex Parte Young* exception did not apply.

But the Medicaid Act is not analogous to the Surface Mining Act. It does not grant to the States exclusive jurisdiction over their Medicaid programs. Rather, it requires States to have their plans approved by [**19] the supervising federal agency and to adhere to strict federal guidelines. 42 U.S.C. § § 1396, 1396a. States that do not maintain their plans in compliance with the federal guidelines are denied continuing Medicaid funding from the federal government. 42 U.S.C. § 1396c. Thus, these federal standards remain the directly applicable standards with which the States must comply in order to receive federal Medicaid funding. Because the

plaintiffs are seeking to enforce these directly applicable [*188] federal standards, the principles of *Pennhurst* and *Bragg* do not apply to remove this action from the *Ex Parte Young* exception.

D

The North Carolina officials next contend that the Medicaid Act, as Spending Clause legislation, is not "supreme" law and therefore does not fall within *Ex Parte Young*'s defining purpose, which is to "give life to the Supremacy Clause." *Bragg*, 248 F.3d at 292 (quoting *Green*, 474 U.S. at 68). They argue that "Spending Power enactments do not constitute the supreme authority of the United States, because the Constitution grants the Federal Government no power of compulsion under [**20] the Spending Clause." Indeed, the Medicaid program itself is a voluntary one and States could just as well adopt their own program. Thus, they conclude, the State and federal governments are on "equal constitutional footing," and neither has the power to compel the other. *See Westside Mothers v. Haveman*, 133 F. Supp. 2d 549, 562 (E.D. Mich. 2001) (appeal pending) (holding that "because congressional enactments pursuant to the Spending Power that set forth the terms of federal-state cooperative agreements depend on the voluntary agreement of participating States and are not within the ambit of the Supremacy Clause, they are not the supreme law of the land, and suits cannot be brought against State officials under *Ex Parte Young* to enforce those requirements").

The North Carolina officials' novel position is, however, at odds with existing, binding precedent. The Supreme Court has noted that, "although participation in the

Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX [the Medicaid Act]." *Harris v. McRae*, 448 U.S. 297, 301, 65 L. Ed. 2d 784, 100 S. Ct. 2671 (1980). [**21] Thus, for those States that opt to participate in the program, the requirements of the Medicaid Act are mandatory. Consistent with this conclusion, the Supreme Court has treated the Medicaid Act as "supreme" law and has invalidated conflicting State law under the Supremacy Clause. *See Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 478, 134 L. Ed. 2d 115, 116 S. Ct. 1063 (1996) (remanding for the entry of an injunction against the enforcement of State law to the extent that it conflicted with the Medicaid Act); *see also Randall v. Lukhard*, 729 F.2d 966 (4th Cir. 1984) (en banc) (adopting holding from *Randall v. Lukhard*, 709 F.2d 257, that a Virginia rule was invalid because it conflicted with a provision of the Medicaid Act).

We are constrained to follow these precedents and thus conclude that the plaintiffs properly alleged an ongoing violation of supreme federal law.

E

The North Carolina officials next contend that "any injunctive relief ordered against the official defendants in this case would actually be directed at North Carolina, something clearly forbidden by the Eleventh Amendment," and that the State is, therefore, [**22] the "real party in interest."

This assertion, however, applies to every *Ex Parte Young* action. Injunctive relief of the type sought in this case will almost always, in some sense, affect the State itself. *See*

Coeur d' Alene Tribe, 521 U.S. at 269 (noting that "when suit is commenced against state officials, even if they are named and served as individuals, the State itself will have a continuing interest in the litigation whenever state policies or procedures are at stake. This commonsense observation of [*189] the State's real interest when its officers are named as individuals has not escaped notice or comment from this Court, either before or after *Young*"). In fact, in *Ex Parte Young* itself, the actual defendant was the State Attorney General; yet the effect of the case was to nullify a State statute because the Court ordered the Attorney General not to enforce the statute. *See generally* 209 U.S. 123.

Similarly, in this case, even though the actual defendants are the State officials who oversee North Carolina's Medicaid program, the relief requested would necessarily require North Carolina itself to change its Medicaid program to come into [**23] compliance with the Medicaid Act. While such an order might result in an intrusion on North Carolina's sovereignty, it would be precisely the type of order that is allowed under *Ex Parte Young* and its progeny. *See Rehabilitation Ass'n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1449 (4th Cir. 1994) (rejecting Virginia's claim that the State was the real party in interest because "the suit [sought] prospective, injunctive relief only, rather than any form of retroactive compensatory damages, and [was] brought against Kozlowski, not the State").

As part of their argument that plaintiffs' complaint is actually directed at the State, rather than at State officials, the North Carolina officials also contend that the plaintiffs' requested relief would undermine North Carolina's "special

sovereignty interests." They argue that North Carolina has a "special sovereignty interest in being able to decide the extent to which its limited Medicaid funds will be used for optional Medicaid services ... or be spent to compensate dentists and other health care providers who choose to participate in Medicaid," and that an infringement on this interest makes the *Ex Parte Young* [**24] exception to Eleventh Amendment immunity inapplicable in this case.

In *Coeur d'Alene Tribe*, the Supreme Court recognized that in some cases, special sovereignty interests will prevent an otherwise proper *Ex Parte Young* action from proceeding against State officials. The Court determined that *Ex Parte Young* did not apply in that case because the suit "would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect." *Coeur d' Alene Tribe*, 521 U.S. at 283. Thus, the Court determined that "under these particular and special circumstances," the *Ex Parte Young* exception to sovereign immunity was inapplicable. *Id.* at 287.

Similarly, we have recognized the applicability of the "special sovereignty interest" exception in circumstances when quasi-judicial state officers were sued in federal court to answer to assertions that they made the wrong decision in deciding a matter within their jurisdiction. *Bell Atlantic Md.*, 240 F.3d at 294. We noted that "the scope of interests that *Ex Parte Young* protects in preventing [**25] violations of federal law must be carefully circumscribed so as not unduly to erode the important underlying doctrine of sovereign immunity." Id.

This case, however, does not present a special sovereignty interest that would allow North Carolina to use its

sovereign immunity shield to avoid an otherwise proper *Ex Parte Young* action. Rather, it involves a federally designed healthcare program in which the federal government has invited the States to participate if they agree to certain federally established conditions. "A state's interest in administering a welfare program at least partially funded by the federal government is not [*190] such a core sovereign interest as to preclude the application of *Ex Parte Young*." *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999); *cf. TFWS, Inc. v. Schaefer*, 242 F.3d 198, 205-06 (4th Cir. 2001) (holding that "Maryland's power under the Twenty-first Amendment is not as basic or exclusive as a state's territorial right to its submerged land," and concluding that the State's power under that amendment does not qualify as a special State sovereignty interest under *Coeur d'Alene Tribe*). [**26] North Carolina *elected* to participate in the federal Medicaid program and, therefore, to be bound by the requirements of the Medicaid Act. In doing so, the State agreed to the conditions of participation, including the possibility that if it failed to conform to the program as established by federal law, it faced the risk of being ordered by a federal court to correct the problems in its system. If the State did not want to face this federal involvement, it was free to decline federal funds and operate a State program for medical assistance using its own standards or to decline to operate such a program at all.

Although North Carolina may retain a special sovereignty interest in choosing whether to participate in the Medicaid program, once it elects to participate, it is not entitled to assert that interest to insulate itself from the requirements of the federal program.

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F

The North Carolina officials next contend that in enacting the Medicaid Act, Congress provided a remedy that should displace any *Ex Parte Young* action that seeks to compel State compliance with the Medicaid Act. They note that under the Medicaid Act, withholding federal funds is the statutory sanction [**27] for noncompliance.

It is true that in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), the Supreme Court held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex Parte Young*." *Id.* at 74. But in designing an act in which a State could participate entirely or not at all, such as the Medicaid Act, Congress has not prescribed a detailed remedial scheme for dealing with noncompliance with the Act once a State elects to participate. On the contrary, the Supreme Court has concluded that the Medicaid Act does not provide the type of detailed remedial scheme that would supplant an *Ex Parte Young* action. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521-22 (1990) (holding that neither the provisions of the Medicaid Act authorizing the secretary to withhold approval of plans or to curtail federal funds to States whose plans are not in compliance with the Act, nor the required State administrative [**28] system allowing for appeals of reimbursement rates could be "considered sufficiently comprehensive to demonstrate a congressional intent to withdraw the private remedy of § 1983"); *see also Md. Psychiatric Soc'y v. Wasserman*, 102 F.3d 717, 719 n.* (4th Cir. 1996) (rejecting

the argument that the Medicaid Act has a detailed remedial scheme evidencing congressional intent to foreclose *Ex Parte Young* actions brought to compel State officials to comply with the requirements of the Act).

Accordingly, we find no merit in this argument.

G

Finally, the North Carolina officials argue that this action is not a proper [*191] *Ex Parte Young* action because it involves discretionary, not ministerial, acts by State officials. *See Ex Parte Young*, 209 U.S. at 158 ("There is no doubt that the court cannot control the exercise of the discretion of an officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action").

This argument lacks merit because the Medicaid Act does not provide participating States with discretion to deny dental [**29] screening and treatment as specified in the Act. To the contrary, the Medicaid Act clearly mandates that a State provide a certain level and quality of dental care. In light of this duty, a federal court can "direct [the] affirmative action [of complying with this duty]," and plaintiffs' allegations, if true, demonstrate that North Carolina State officers have "refused or neglected to take such action." *Id.* at 158; *see also Lewis v. N.M. Dep't of Health*, 261 F.3d 970, 976 (10th Cir. 2001) (allowing an *Ex Parte Young* challenge to New Mexico's Medicaid program to proceed despite an assertion that the claim impacted discretionary acts by State officials because the action requested only an order that State officials "comply with

federal law," not how to use their discretion in complying).

In this case the plaintiffs seek only an order requiring North Carolina officials to comply with the mandates of the Medicaid Act to provide a specified type and level of care, not how to exercise any discretion conferred by that Act.

III

For the foregoing reasons, we affirm the district court's order denying the North Carolina officials' motion to dismiss [**30] this case on the basis of Eleventh Amendment immunity. We conclude, as did the district court, that this action, as defined by the complaint, falls within the exception to that immunity provided by *Ex Parte Young*.

We decline to consider the other jurisdictional questions raised by the defendants at this stage of the proceedings. These issues are not "inextricably intertwined" with North Carolina's Eleventh Amendment immunity claim, nor is consideration of these issues "necessary to ensure meaningful review of the ... immunity question." *Taylor v. Waters*, 81 F.3d 429, 437 (4th Cir. 1996); *see also Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51, 131 L. Ed. 2d 60, 115 S. Ct. 1203 (1995).

AFFIRMED

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

[Caption Omitted in Printing]

ORDER

This matter is before the court on defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Rules 12 (b) (1) and 12 (b) (6), respectively, of the Federal Rules of Civil Procedure. Plaintiffs submitted a motion to strike defendants' responsive memorandum under Local Rule 4.06 of the Eastern District of North Carolina. The parties have filed various documents in support of their postions. This matter is ripe for adjudication.

STATEMENT OF THE CASE

Six named plaintiffs filed this action on November 9, 2000, alleging violations of federal law by the State of North Carolina in the provision of dental care to Medicaid program recipients.[1] Plaintiffs' complaint named David Bruton,[2] Director of the North Carolina Department of Health and Human Services, and Richard Perruzzi, Director of the North Carolina Division of Medicaid Assistance, as defendants.

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[1] A party attains class action status only after the filing of an appropriate motion for class certification and a court order granting the motion.

[2] Bruton's successor, Carmen Hooker Buell is properly before the court pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

Plaintiffs assert the Medicaid reimbursement rates in North Carolina are so low that few dentists are willing to participate in the Medicaid program in North Carolina. Plaintiffs assert that because of the lack of participation, Medicaid recipients have extreme difficultly locating dentists accepting Medicaid patients and often have to travel long distances to obtain services, thus making dental care practically unavailable to many Medicaid recipients.[3]

Plaintiffs filed their complaint pursuant to 42 U.S.C. § 1983. Plaintiffs seek declaratory relief against state officials and an injunction requiring defendants to comply with federal law and to make dental services more readily available to Medicaid recipients.

COURT'S DISCUSSION

I. Standard of Review

In reviewing a motion to dismiss, the court should view the allegations of the complaint in the light most favorable to the plaintiff. See De Sole v. United States, 947 F.2d 1169 (4th Cir. 1991). The court must accept the factual allegations of the complaint but is not bound with regard to its legal conclusions. See District 28, United Mine Workers, Inc. v. Wellmore Coal Corp. 609 F.2d 1083, 1085 (4th Cir. 1979). Plaintiffs are entitled to reasonable inferences by the court in ruling on a motion to dismiss. See Mylan Lab., Inc. v. Akzo, N.V., 2 F.3d

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[3] Plaintiffs' complaint asserts that the task force for the North Carolina Institute of Medicine reports that only twenty percent of Medicaid beneficiaries visited a dentist in 1998.

56 (4th Cir. 1993). Motions to dismiss are granted only where the plaintiff cannot prove any set of facts which would entitle him to relief. See Mylan Lab., Inc. v. Matkari, 7 F.3d 1130 (4th Cir. 1993).

II. Medicaid Background

Medicaid as part of the Social Security Act ("Act") creates a cooperative federal-state program through which the federal government provides financial assistance to States furnishing medical care to needy individuals. 42 U.S.C. § 1396; Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502, 110 S. Ct. 2510, 2513 (1990). While states are not required to provide Medicaid benefits, states choosing to participate in a federally funded Medicaid program must comply with requirements imposed by the Act and related administrative regulations. Each state participating in the Medicaid program must have a "plan for medical assistance" approved by the Secretary of the United States Department of Health and Human Services ("DHHS"). 42 U.S.C. § 1396a. The plan must include "a scheme for reimbursing health care providers for the medical services provided to needy individuals." Failure of the state plan to conform with federal laws and regulations may result in loss of federal aid for the Medicaid program. 42 U.S.C. § 1396c.

States participating in the Medicaid program must provide dental care for eligible children under age twenty-one. 42 U.S.C. §§ 1396a(a) (43), 1396d(r). States may also provide dental care to adults, but the optional services must comply with federal laws and regulations. 42 U.S.C. § 1396a.

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North Carolina has chosen to participate in the federally funded Medicaid program which is administered by the North Carolina Department of Health and Human Services ("NCDHH"), a department currently under the direction of defendant Carmen Buell. N.C.G.S. § 108A-54. Dental services are provided to both qualified children and adults at reimbursement rates set by the state and approved by the Health Care Financing Administration ("HCFA") [4]. Id. § 108-55(c).

III. Eleventh Amendment Immunity

Defendants first assert that this action is barred under the Eleventh Amendment. "[T]he Eleventh Amendment [does not] preclude a private citizen from suing a state officer in federal court 'to ensure that the officer's conduct is in compliance with federal law.' " Litman v. George Mason Univ., 186 F.3d 544, 550 (4th Cir. 1999). Under the Ex parte Young doctrine, plaintiffs may seek prospective, but not retrospective, relief against public officials to ensure complaince with federal law. Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908).

It is clear that plaintiffs' complaint seeks prospective relief. While an order from the court requiring state officials to comply in the future with federal law might incidently require the expenditure of public funds, the indirect effect on the state treasury does not mean that plaintiffs seeks money

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[4] The Secretary of DHHS has delegated the authority to adminsister the Medicaid program and implement regulations at the federal level to HCFA. 42 U.S.C. § 1302; 49 Fed. Reg. 35,247, 35,249 (1984).

damages for past wrongs. Edelman v. Jordan, 415 U.S. 651, 668 (1974) ("[An] ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young."); see also Rehabilitation Ass'n v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994).

The court finds equally unpersuasive defendants' assertion that no ongoing violation is implicated because plaintiffs are receiving dental treatment by a dentist or clinic that accepts Medicaid. Plaintiffs' complaint asserts that Medicaid recipients are "unable to obtain prompt and adequate dental services" in their geographical area because of a shortage of participating Medicaid providers, and that federal law grants them the right to quality access and care for dental services without having to resort to extraordinary measures to obtain those services. Thus, even if plaintiffs are receiving treatments, they have alleged an ongoing violation of federal law.

Defendants next assert that Eleventh Amendment immunity is applicable because plaintiffs seek an order requiring state officials to conform their conduct to state law. Defendants argue that the standard governing Medicaid payments is a state standard, as opposed to federal standard. However, while the repeal of the Borden Amendment gave states greater flexibility in setting Medicaid reimbursement rates and may have withdrawn Medicaid providers' right to challenge reimbursement rates, the amendment did not change a state's duty to ensure that its Medicaid program complies with federal standards. Plaintiffs state a federal claim by alleging a specific conflict between North Carolina's plan or practice in administering its Medicaid program and a federal

mandate. Thus, plaintiffs do not seek enforcement of state law, but istead seek an order requiring state officials to conform their policies and practices with federal laws and regulations requiring quality care and equal access to medical services.

Finally, the state argues that this suit implicates "special sovereignty" interests affecting core aspects of the State's sovereignty because the State must be able to decide the manner in which to sue "limited Medicaid funds." Idaho v Coeur d' Alene Tribe, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438, 453 (1997). However, the federal government does not require states to provide or participate in the Medicaid program, and each state is free to discontinue the program. Moreover, it has long been accepted that the federal government may attach strings to federal funds with which a state participating in the program must comply. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). The court, therefore, concludes that the State's interest in administering a welfare program funded partially by the federal government does not implicate core aspects of state sovereignty.[5]

IV. Failure to State a Claim

A. Standard for Alleging Violation of Federal Right Under § 1983

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[5] Defendants argue that plaintiffs, as third party beneficiaries of the Medicaid Act, may not seek enforcement under section 1983. Defendants' argument is without merit, and the court does not discuss it in detail.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

To state a claim under § 1983, plaintiffs must assert the violation of a federal right, and not just the violation of federal law. Golden State Transit Corp. v. Los Angeles, 493 U.S.103, 106, 110 S. Ct. 444, 107 L. Ed. 2d 420 (1989). When Congress has not foreclosed enforcement of statutory laws within the enactment, courts use three factors to determine if a plaintiff asserts a violation of a federal right under § 1983. See Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 509, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). Under the Wilder standard, courts look to (a) whether Congress intended the statutory provision in question to benefit the plaintiff; (b) whether the statute imposes a binding obligation on the state, rather than merely expressing a congressional preference for certain kinds of treatment; and (c) whether the right allegedly protected by the statute is not so vague and amorphous as to render it beyond the competence of the judiciary to enforce. Blessing v. Freestone, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997); Wilder, 496 U.S. at 509. Subsequent Supreme Court cases have clarified that Congress must unambiguously confer an individual entitlement to services on a particular plaintiff to state a claim under § 1983. Blessing, 520 U.S. at 343-45; Suter v. Artist M., 503 U.S. 347, 356, 112 S. Ct. 1360, 118 L. Ed. 2d. 1 (1992). Moreover, in determining whether a statute creates a federal right, the court must break the complaint "down into manageable analytic bites." Blessing, 520 U.S. at 342. With this framework in mind, the court turns to the merits of defendants' 12 (b) (6) motion.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

B. Equal Access and Quality of Care Under 42 U.S.C. § 1396a (a) (3) (A).

Section 1396 (a) (3) (A) provides:

> A State plan for medical assistance . . . must provide such methods and procedures relating to the utilization of, and payment for, care and services available under the plan . . . as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with quality of care and are sufficient enough to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396 (a) (30) (A).

Plaintiffs maintain that this provision creates an entitlement in plaintiffs to the substantive rights of quality of care and equal access to medical services. The court agrees with plaintiffs and the substantial weight of authority supporting plaintiffs' contentions. First, the provisions are obviously intended to benefit medicaid recipients as they focus directly on recipients' quality of and access to adequate medical care. See Evergreen Presbyterian Ministries, Inc. v. Hood, 235 F.3d 908, 927-28 (5th Cir. 2000); Arkansas Med. Soc'y v. Reynolds, 6 F.3d 519, 526 (8th Cir. 1993). Second, the statutory provision is prefaced in mandatory terms so as to "unambiguously impose a binding obligation on the States." Blessing, 520 U.S. at 341; see also Evergreen, 235 F.3d at 931.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

Additionally, equal access and quality of care are sufficently specific and detailed to create an enforceable right under § 1983. As noted by the United States Court of Appeals for the Fifth Circuit in Reynolds, the Supreme Court held that "reasonable access" to medical care was not sufficiently vague and amorphous to defeat a cause of action under the Borden Act, and the term "equal access," arguably provides a more concrete standard than "reasonable access." See Reynolds, 6 F.3d at 527. Moreover, because equal access and quality of care are measured against the access and care rendered to the general population in the same geographic area, there is an "objective benchmark" for measurement. See Evergreen, 235 F.3d at 931"; cf. Wilder, 496 U.S. at 519.

Finally, the "mere fact that an obligation is couched in a requirement that the State file a plan is not itself sufficient grounds for finding the obligation unenforceable under § 1983." Harris v. James, 127 F.3d 993, 1003 (11th Cir. 1997). In 1994, Congress amended the Social Security Act to provide:

> In an action brought to enforce [the Social Security Act] . . . such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifiying the required contents of a State plan.

42 U.S.C. § 1320a-2. Defendants' motion to dismiss Count One is DENIED.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

C. Statewide Availability Under 42 U.S.C. § 1396a (a) (1)

Plaintiffs also claim that the plan is "not in effect in all political subdivisions of the State," Compl. ¶ 88, in violation of the following federal law:

> A state plan for medical assistance must provide that it shall be in effect in all political subdivisions of the State, and if administered by them, be mandatory upon them.

42 U.S.C. § 1396a (a) (1).

With regard to the Wilder standard, the court finds that Congress intended the statutory provision to benefit Medicaid recipients by ensuring statewide application of Medicaid plans, that the provision's command is mandatory and specific, and that the requirement is within the competence of the judiciary to enforce. Assuming, arguendo, that plaintiffs can show that the plan is not in effect statewide or is not mandatory for all of the political subdivisions that administer it, plaintiffs have stated a cause of action under 42 U.S.C. § 1396a (a) (1),[6] and defendants' motion as to Count Two is DENIED.

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[6] Because plaintiffs have alleged that defendants' "plan for dental services is not in effect in all political subdivision," Comp. ¶ 88, the court does not address at this stage defendants' argument that the statutory provision only contains a procedural requirement that the plan apply statewide, as opposed to the substantive requirement that the state ensure that the plan is administered even handedly.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

D. Reasonable Promptness Under 42 U.S.C. § 1396a (a) (8)

Section 1396a (a) (8) provides:

> A State plan for medical assistance must . . . provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals.

42 U.S.C. § 1396a (a) (8).

While defendants contend that the statute applies only to the Medicaid application process, the statute clearly applies to the furnishing of medical services as well. Moreover, under the Wilder standard the statute is clearly intended to benefit the Medicaid beneficiaries and is mandatory on the states. The harder question is whether the "reasonable promptness" provision is so vague and amorphous as to be unenforceable. This court finds the Eleventh Circuit's reasoning in Doe v. Chiles, 136 F.3d 709, 717-19 (11th Cir. 1998), persuasive, and the court concludes that plaintiffs have an enforceable federal right to reasonably prompt provision of assistance under section 1396a (a) (8) of the Medicaid Act.

E. Freedom of Choice Under 42 U.S.C. § 1396a(a) (23)

Plaintiffs' fourth case of action asserts that defendants' policies and practices of paying lower reimbursement fees have

created a lack of choice in violation of section 1396a (a) (23) which provides:

> Any individual eligible for medical assistance . . . may obtain such assistance from any . . . person qualified to perform the services or services required, . . . who undertakes to provide him such services . . . .

42 U.S.C. § 1396a(a) (23) (emphasis added).

Assuming, arguendo, that this section creates a private cause of action under § 1983, the court must grant defendants' motion to dismiss Count Four because plaintiffs' complaint does not allege that defendants created obstacles to plaintiffs' right to choose among qualified providers willing to serve plaintiffs. Whether in the interest of higher profits or because rates are too low to remain solvent, health care providers may choose not to participate in a Medicaid program. Section 1996a (a) (23) (A) does not encompass the right to free access to doctors unwilling to service Medicaid patients. In addition, to the limiting language of the statute, the interpreting regulation and legislative history indicate that while the government is prohibited from blocking access to qualified providers willing to provide the services, § 1396a (a) (23) (A) itself does not impose on states an affirmative duty to ensure that plaintiffs have a large pool of dentist from which to choose. See 42 C.F.R. § 431.51 (b) (1) ("[A] recipient may obtain Medicaid services from any . . . person . . . (i) Qualified to furnish the services; and (ii) Willing to furnish them to that particular recipient." (emphasis added)); S. Rep. No. 744, 90th Cong., 1st Sess. (1967) ("It is possible that some providers of service may still not be willing or considered qualified to

provide the services included in the State plan. This provision does not obligate the State to pay the charges of the provider without reference to its schedule of charges or its standards of care." (emphasis added)). While failure to provide reasonable rates to attract a large pool of providers may violate other Medicaid provisions, plaintiffs' complaint does not allege a violation of section 1396a (a) (23) (A).

F. Comparable Care Under 42 U.S.C. § 1396a (a) (10) (B)

Section 1396a (a) (10) (B) provides that "medical assistance made available to any individual" to whom medical assistance must be provided under the Act "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and . . . shall not be less in amount, duration, or scope than the medical assistance made available to individuals not desribed in subparagraph (A)." 42 U.S.C. § 1396a (a) (10) (B). Subparagraph (A) lists many types of needy individuals to whom medical assistance must be provided. Id. § 1396a (a) (10) (A). One type of group is the "categorically needy" - those groups who lack sufficient income to meet their basic needs. On the other hand, the group of "medically needy" includes individuals whose may have resources to meet their basic needs, but not their medical needs. It is undisputed that a state electing to provide Medicaid to the medically needy must also provide aid in the same amount, duration, and scope to the categorically needy.

Under the Wilder analysis, the court concludes that plaintiffs are the intended beneficiaries of the statute, that the obligations are mandatory, and that enforcement of the right would not strain judicial competency. Thus 1396a (a) (10) (B)

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

creates a private cause of action under 42 U.S.C. § 1983. See generally Sobky v. Smolev, 855 F. Supp. 1123, 1139 (E.D. Cal. 1994).

However, defendants contend that plaintiffs have not stated a violation under the statute because the Act is limited to discrimination between the "medically needy" and the "categorically needy." Plaintiffs, on the other hand, contend that not only do the regulations prohibit discrimination against categorically needy, but also among the categorically needy.

The court agrees with plaintiffs' interpretation of the statute. First, the statute refers to benefits received by "individuals." Second, the implementing regulations clearly provide that the state must not discriminate within the categorically needy group. See 42 C.F.R. § 440.240 (b) ("The plan must provide that the services available to any individual" in the medically needy and categorically needy groups "are equal in amount, duration, and scope for all recipients within the group."); 42 C.F.R. § 440.250(a) (stating "a plan must provide that the services available to any categorically needy recipient under the plan are not less in amount duration, and scope than those services available to a medically needy recipient."). While defendants correctly asserts that the Fourth Circuit holds that "a formal regulation cannot by itself give rise to a federal right enforceable under § 1983," HCMF Corp. v. Allen, 238 F.3d 273, 277 (4th Cir. 2001) (emphasis added), this principle does not preclude a court from placing favorable weight on an eminently reasonable statutory interpretation by the agency charge with enforcing the Act. Defendants' motion to dismiss Count Five is DENIED.

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

G. Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Under 42 U.S.C. §§ 1396a (a) (10), 1396a (a) (43), 1396d (r)

Plaintiffs' final count charges that defendants' alleged failure to provided needed EPSDT services creates an actionable right under the Medicaid Act and related regulations. Section § 1396(a) (a) (10) provides that a state Medicaid plan must provide for "making medical assistance available." Section 1396 (a) (4) (b) defines "medical assistance" to include EPSDT, and § 1396d (r) clarifies the type of services to include "at a minimum . . . relief of pain and infection, restoration of teeth, and maintenance of dental health." Id. § 1396d (r). These and other provision of the Act are aimed at ensuring "that poor children receive comprehensive health care at an early age . . . [and] designed to provide health education, preventive care, and effective follow-up care for conditions indentified during check-ups." Salazar v. District of Columbia, 954 F. Supp. 278, 303 (D.D.C. 1996).

The court concudes that Count Six states a valid cause of action under Wilder. Not only are the provisions mandatory and intended to benefit plaintiffs, the statute and interpreting regulations provide sufficient detail to provide an objective benchmark for measurement. See generally Wellington v. District of Columbia, 851 F. Supp. 1, 6-7 (D.D.C. 1994).

CONCLUSION

For the foregoing reasons, the court DENIES defendants' motion to dismiss for lack of subject matter jurisdiction. The court DENIES defendants' motion to

ORDER (DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION), DATED APRIL 17, 2001

dismiss for failure to state a claim as to Counts One, Two, Three, Five, and Six. The court GRANTS defendants' motion to dismiss Count Four. Plaintiffs' motion to Strike is DENIED as moot.

This 13th day of April, 2001.

MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
#6

ORDER (DENYING DEFENDANTS' MOTION TO AMEND), DATED JULY 10,2001

[Caption Omitted in Printing]

ORDER

This matter is before the court on defendants' motion to amend the court's April 17, 2001, order. Defendants are pursuing an appeal of right to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") for review of the court's decision that Eleventh Amendment immunity does not bar plaintiffs' claims. Defendants also request that this court certify to the Fourth Circuit the question of whether the Medicaid Act confers enforceable rights on the plaintiffs against defendants pursuant to 28 U.S.C. § 1983.

After careful review of the record and the relevant legal issues, the court concludes that certification is not warranted and DENIES defendants' motion to amend.

This 9th day of July, 2001.

MALCOLM J. HOWARD

United States District Judge

At Greenville, NC
#6

CONSTITUTION OF THE UNITED STATES OF AMERICA
ARTICLE I. LEGISLATIVE DEPARTMENT

CONSTITUTION OF THE UNITED STATES OF AMERICA
ARTICLE I. LEGISLATIVE DEPARTMENT

Const. Art. I, § 8, Cl 1 (2002)
Sec. 8, Cl 1. Powers of Congress--Taxation.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U. S. Const. amend. XI

U. S. Const. amend. XI

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XI

Suits against states--Restriction of judicial power.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C.S. § 1396a(a)(1)(2001)

42 U.S.C.S. § 1396a(a)(1)(2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a State plans for medical assistance

(a) Contents. A State plan for medical assistance must –
(1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them;

42 U.S.C.S. § 1396a(a)(4)(B) (2001)

42 U.S.C.S. § 1396a(a)(4)(B) (2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must –
(4) provide . . . (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community service aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency.

42 U.S.C.S. § 1396a(a)(8)(2001)

42 U.S.C.S. § 1396a(a)(8)(2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must --

(8) provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals;

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must–

(10) provide–

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1905(a) [42 USCS § 1396d(a)(1)-(5), (17) and (21)], to--

(i) all individuals–

(I) who are receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI , or part A or part E of title IV [42 USCS § § 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq., or 601 et seq. or 670 et seq.] (including individuals eligible under this title [42 USCS § § 1396 et seq.] by reason of section 402(a)(37), 406(h), or 473(b) [42 USCS § 673(b)], or considered by the State to be receiving such aid as authorized under section 482(e)(6)),

(II) with respect to whom supplemental security income benefits are being paid under title XVI [42 USCS § 1381 et seq.] (or were being paid as of the date of the enactment of

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

section 211(a) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193) [enacted Aug. 22, 1996]) and would continue to be paid but for the enactment of that section or who are qualified severely impaired individuals (as defined in section 1905(q) [42 USCS § 1396d(q)]),

(III) who are qualified pregnant women or children as defined in section 1905(n) [42 USCS § 1396d(n)],

(IV) who are described in subparagraph (A) or (B) of subsection (l)(1) and whose family income does not exceed the minimum income level the State is required to establish under subsection (l)(2)(A) for such a family; [,] or

(V) who are qualified family members as defined in section 1905(m)(1) [42 USCS § 1396d(m)(1)],

(VI) who are described in subparagraph (C) of subsection (l)(1) and whose family income does not exceed the income level the State is required to establish under subsection (l)(2)(B) for such a family, or

(VII) who are described in subparagraph (D) of subsection (l)(1) and whose family income does not exceed the income level the State is required to establish under subsection (l)(2)(C) for such a family; [and]

(ii) at the option of the State, to any group or groups of individuals described in section 1905(a) [42 USCS § 1396d(a)] (or, in the case of individuals described 42 USCS § 1396d(a)(i)], to any reasonable categories of such individuals) who are not individuals described in clause (i) of this subparagraph but–

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

(I) who meet the income and resources requirements of the appropriate State plan described in clause (i) or the supplemental security income program (as the case may be),

(II) who would meet the income and resources requirements of the appropriate State plan described in clause (i) if their work-related child care costs were paid from their earnings rather than by a State agency as a service expenditure,

(III) who would be eligible to receive aid under the appropriate State plan described in clause (i) if coverage under such plan was as broad as allowed under Federal law,

(IV) with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them, aid or assistance under the appropriate State plan described in clause (i), supplemental security income benefits under title XVI [42 USCS § § 1381 et seq.], or a State supplementary payment;[,]

(V) who are in a medical institution for a period of not less than 30 consecutive days (with eligibility by reason of this subclause beginning on the first day of such period), who meet the resource requirements of the appropriate State plan described in clause (i) or the supplemental security income program, and whose income does not exceed a separate income standard established by the State which is consistent with the limit established under section 1903(f)(4)(C) [42 USCS § 1396b(f)(4)(C)],

(VI) who would be eligible under the State plan under this title [42 USCS § § 1396 et seq.] if they were in a medical institution, with respect to

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

whom there has been a determination that but for the provision of home or community-based services described in subsection (c), (d), or (e) of section 1915 [42 USCS § 1396n(c), (d), or (e)] they would require the level of care provided in a hospital, nursing facility or intermediate care facility for the mentally retarded the cost of which could be reimbursed under the State plan, and who will receive home or community-based services pursuant to a waiver granted by the Secretary under subsection (c), (d), or (e) of section 1915 [42 USCS § 1396n(c), (d), or (e)],

(VII) who would be eligible under the State plan under this title [42 USCS § § 1396 et seq.] if they were in a medical institution, who are terminally ill, and who will receive hospice care pursuant to a voluntary election described in section 1905(o) [42 USCS § 1396d(o)];[,]

(VIII) who is a child described in section 1905(a)(i) [42 USCS § 1396d(a)(i)]–

(aa) for whom there is in effect an adoption assistance agreement (other than an agreement under part E of title IV [42 USCS §§ 671 et seq.]) between the State and an adoptive parent or parents,

(bb) who the State agency responsible for adoption assistance has determined cannot be placed with adoptive parents without medical assistance because such child has special needs for medical or rehabilitative care, and

(cc) who was eligible for medical assistance under the State plan prior to the adoption assistance agreement being entered into, or who would have been eligible for medical assistance at such time if the eligibility

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

standards and methodologies of the State'sfoster care program under part E of title IV [42 USCS § § 670 et seq.] were applied rather than the eligibility standards and methodologies of the State's aid to families with dependent children program under part A of title IV [42 USCS § § 601 et seq.];[,]

(IX) who are described in subsection (l)(1) and are not described in clause (i)(IV), clause (i)(VI), or clause (i)(VII);[,]

(X) who are described in subsection (m)(1);[,]

(XI) who receive only an optional State supplementary payment based on need and paid on a regular basis, equal to the difference between the individual's countable income and the income standard used to determine eligibility for such supplementary payment (with countable income being the income remaining after deductions as established by the State pursuant to standards that may be more restrictive than the standards for supplementary security income benefits under title XVI [42 USCS § § 1381 et seq.]), which are available to all individuals in the State (but which may be based on different income standards by political subdivision according to cost of living differences), and which are paid by a State that does not have an agreement with the Commissioner of Social Security under section 1616 or 1634 [42 USCS § 1382e or 1383c];

(XII) who are described in subsection (z)(1) (relating to certain TB-infected individuals);

(XIII) who are in families whose income is less than 250 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

673(2) of the Omnibus Budget Reconciliation Act of 1981 [42 USCS § 9902(2)]) applicable to a family of the size involved, and who but for earnings in excess of the limit established under section 1905(q)(2)(B) [42 USCS § 1396d(q)(2)(B)], would be considered to be receiving supplemental security income (subject, notwithstanding section 1916 [42 USCS § 1396o], to payment of premiums or other cost-sharing charges (set on a sliding scale based on income) that the State may determine);

(XIV) who are optional targeted low-income children described in section 1905(u)(2)(B) [42 USCS § 1396d(u)(2)(B)];

(XV) who, but for earnings in excess of the limit established under section 1905(q)(2)(B) [42 USCS § 1396d(q)(2)(B)], would be considered to be receiving supplemental security income, who is at least 16, but less than 65, years of age, and whose assets, resources, and earned or unearned income (or both) do not exceed such limitations (if any) as the State may establish;

(XVI) who are employed individuals with a medically improved disability described in section 1905(v)(1) [42 USCS § 1396d(v)(1)] and whose assets, resources, and earned or unearned income (or both) do not exceed such limitations (if any) as the State may establish, but only if the State provides medical assistance to individuals described in subclause (XV);

(XVII) who are independent foster care adolescents (as defined in section 1905(w)(1) [42 USCS § 1396d(w)(1)]), or who are within any reasonable categories of such adolescents specified by the State; or

42 U.S.C.S. § 1396a(a)(10)(A) & (B) (2001)

(XVIII) who are described in subsection (aa) (relating to certain breast or cervical cancer patients);

(B) that the medical assistance made available to any individual described in subparagraph (A)–

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A);

42 U.S.C.S. § 1396a(a)(23) (2001)

42 U.S.C.S. § 1396a(a)(23) (2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must –(23) except as provided in subsection (g), in section 1915 [42 USCS §§ 1396n], and in section 1932(a) 42 USCS §§ 1396u-2(a)] and except in the case of Puerto Rico, the Virgin Islands, and Guam, provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services, and (B) an enrollment of an individual eligible for medical assistance in a primary care case-management system (described in section 1915(b)(1) [42 USCS §§ 1396n(b)(1)]), a medicaid managed care organization, or a similar entity shall not restrict the choice of the qualified person from whom the individual may receive services under section 1905(a)(4)(C) [42 USCS § 1396d(a)(4)(C)], except as provided in subsection (g) and in section 1915 [42 USCS §§ 1396n], except that this paragraph shall not apply in the case of Puerto Rico, the Virgin Islands, and Guam, and except that nothing in this paragraph shall be construed as requiring a State to provide medical assistance for such services furnished by

42 U.S.C.S. § 1396a(a)(23) (2001)

a person or entity convicted of a felony under Federal or State law for an offense which the State agency determines is inconsistent with the best interests of beneficiaries under the State plan;

42 U.S.C.S. § 1396a(a)(30)(A) (2001)

42 U.S.C.S. § 1396a(a)(30)(A)(2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must–

(30)(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1903(i)(4) [42 USCS § 1396b(i)(4)]) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area; and

42 U.S.C.S. § 1396a(a)(43) (2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396a. State plans for medical assistance

(a) Contents. A State plan for medical assistance must –

(43) provide for–

(A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1905(r) [42 USCS § 1396d(r)], of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1905(r) [42 USCS § 1396d(r)] and the need for age-appropriate immunizations against vaccine-preventable diseases,

(B) providing or arranging for the provision of such screening services in all cases where they are requested,

(C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services, and

(D) reporting to the Secretary (in a uniform form and manner established by the Secretary, by age group and by basis of eligibility for medical assistance, and by not later than April 1 after the end of each fiscal year, beginning with fiscal year 1990) the following information relating to early and periodic screening,

42 U.S.C.S. § 1396a(a)(43) (2001)

diagnostic, and treatment services provided under the plan during each fiscal year:

(i) the number of children provided child health screening services,

(ii) the number of children referred for corrective treatment (the need for which is disclosed by such child health screening services),

(iii) the number of children receiving dental services, and

(iv) the State's results in attaining the participation goals set for the State under section 1905(r) [42 USCS § 1396d(r)];

42 U.S.C.S. § 1396c (2001)

42 U.S.C.S. § 1396c (2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396c. Operation of State plans

If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this title [42 USCS § § 1396 et seq.], finds--

(1) that the plan has been so changed that it no longer complies with the provisions of section 1902 [42 USCS § 1396a]; or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision; the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 U.S.C.S. § 1396d(r)(2001)

42 U.S.C.S. § 1396d(r)(2001)

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 7. SOCIAL SECURITY ACT

TITLE XIX. GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS

§ 1396d Definitions

(r) **Early and periodic screening, diagnostic, and treatment services.** The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:

(1) Screening services--

(A) which are provided--

(i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1928(c)(2)(B)(i) [42 USCS § 1396s(c)(2)(B)(i)] for pediatric vaccines, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and

(B) which shall at a minimum include--

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

42 U.S.C.S. § 1396d(r)(2001)

(iii) appropriate immunizations (according to the schedule referred to in section 1928(c)(2)(B)(i) [42 USCS § 1396s(c)(2)(B)(i)] for pediatric vaccines) according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance).

(2) Vision services--

(A) which are provided--

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in vision, including eyeglasses.

(3) Dental services--

(A) which are provided--

(i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services--

(A) which are provided--

Supreme Court, U.S.
FILED
SEP 19 2002
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(2)

No. 02-220

IN THE

Supreme Court of the United States

CARMEN HOOKER ODOM, Secretary, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

Petitioners,

v.

SAMUEL ANTRICAN, Minor, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) In this action for injunctive and declaratory relief against Petitioner State Medicaid officials sued in their official capacity, was the Fourth Circuit Court of Appeals correct in holding that under *Ex parte Young* the Eleventh Amendment does not bar the suit and that the District Court correctly denied defendants' motion to dismiss on that ground?

(2) In an interlocutory appeal authorized because the State Medicaid officials moved to dismiss based on Eleventh Amendment immunity, was the Fourth Circuit Court of Appeals correct in refusing to exercise pendant appellate jurisdiction to review claims by the State Medicaid officials on the merits and that are currently pending before the District Court in a separate motion to dismiss?

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II. Petitioners' efforts to expand the scope of their Eleventh Amendment interlocutory appeal identifies no split in the circuits and is foreclosed by this Court's precedent. 8

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STATEMENT OF THE CASE

This case is a routine action brought by several Medicaid beneficiaries against State Medicaid officials in their official capacity. The Complaint alleges ongoing violations of six specific federal Medicaid Act provisions and seeks only prospective declaratory and injunctive relief. Hundreds of such cases have been adjudicated under *Ex parte Young*, 209 U.S. 123 (1908) by the federal courts since the passage of the Medicaid Act in 1965 without any successful challenges under the Eleventh Amendment.

The state officials filed a motion to dismiss the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(1), asserting Eleventh Amendment immunity, and under Fed. R. Civ. P. 12(b)(6), asserting failure to state a claim under 42 U.S.C. § 1983 upon which relief can be granted. On April 17, 2001, North Carolina District Judge Malcolm J. Howard denied the Eleventh Amendment motion to dismiss and granted in part and denied in part the Rule 12(b)(6) motion to dismiss. *See* Petitioners' Appendix (Pet. App.) at 21a-36a; 158 F. Supp. 2d 663 (E.D.N.C. 2001). Specifically, the District Court found that the plaintiffs could enforce all of the provisions cited in their complaint except 42 U.S.C. § 1396a(a)(24) (regarding freedom of choice of Medicaid-participating providers). The plaintiffs did not appeal this decision, because a final judgment has not been entered.

The State officials filed an interlocutory appeal from the denial of Eleventh Amendment immunity with the Fourth Circuit Court of Appeals. They also asked the District Court to certify the other issues in the case to the Circuit Court, but the motion was denied. Pet. App. at 37a. The State officials did not appeal the denial of certification. Instead,

they attempted to have the Circuit Court exercise pendant appellate jurisdiction over the rulings on the merits made by the District Court by claiming that the merits were inextricably intertwined with the Eleventh Amendment issues.

In a unanimous opinion written by Judge Niemeyer, the Fourth Circuit affirmed the District Court's order denying the State officials' motion to dismiss the case on the basis of Eleventh Amendment immunity. Pet. App. at 1a-20a; 290 F.3d 178 (4th Cir. 2002). The Circuit Court declined to consider the other jurisdictional issues raised by the State officials or whether the plaintiffs have a cause of action under § 1983 to enforce the five remaining Medicaid Act provisions cited in their Complaint. The case was returned to the District Court in May 2002. On July 17, 2002, the State officials filed another motion to dismiss pursuant to Rule 12(b)(6), claiming that the Medicaid Act is not enforceable under § 1983, and that fully-briefed motion is now pending before the District Court.

REASONS FOR DENYING THE PETITION

The Petition has not presented any compelling reasons for this Court to exercise discretionary jurisdiction over the Fourth Circuit Court of Appeals decision affirming the District Court's denial of the motion to dismiss. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari will be granted only for compelling reasons."). Petitioners raise several issues, but there is no conflict in the circuits on those issues. At bottom, petitioners simply disagree with the Fourth Circuit's refusal to expand the scope of their Eleventh Amendment interlocutory appeal and of Eleventh

Amendment immunity. In any event, petitioners' arguments are directly contrary to longstanding and recent precedent from this Court.

I. THERE IS NO CONFLICT IN THE CIRCUITS REGARDING WHETHER THE MEDICAID ACT PROVISIONS AT ISSUE HERE ARE ENFORCEABLE UNDER *EX PARTE YOUNG*.

Since the passage of the Medicaid Act in 1965, the federal courts have allowed suits by Medicaid beneficiaries against state officials in their official capacity for prospective enforcement of the federal Medicaid statute. There are literally hundreds of such cases, many of which have been reported. In addition, under the identical statutory framework of the former program of Aid to Families with Dependent Children, this Court, as well as the lower federal courts, also enforced that title of the Social Security Act through prospective relief against state officials. *See, e.g., Blum v. Bacon*, 457 U.S. 132 (1982); *Carleson v. Remillard*, 406 U.S. 598 (1972); *Townsend v. Swank*, 404 U.S. 282 (1971); *Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970); *King v. Smith*, 392 U.S. 309 (1968).

These decisions establish that the Eleventh Amendment is no bar to injunctive relief in suits brought against state officials. These decisions do not mean that every claim of a violation of the Medicaid Act is adjudicated on the merits in federal court. This Court has made it clear that not every violation of federal law is also a violation of federal "rights" which are enforceable under § 1983. *See Gonzaga University v. Doe*, 122 S. Ct. 2268 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997). The lower courts have applied this admonishment and have declined in a number of instances

to allow Medicaid suits to proceed on the merits, finding that no "rights" are involved. *See, e.g., Harris v. James*, 127 F.3d 993 (11th Cir. 1997) (regarding 42 U.S.C. § 1396a(a)(4), requiring "methods of administration" necessary for proper administration); *Cook v. Hairston*, 948 F.2d 1288 (6th Cir. 1991) (case table) (regarding § 1396a(a)(19), requiring provision of services consistent with "best interests" of recipients). In other cases, the courts have found enforceable rights were involved in Medicaid cases and adjudicated the merits. *See, e.g., Evergreen Presbyterian Ministries v. Hood*, 235 F.3d 908 (5th Cir. 2000) (allowing Medicaid beneficiaries to enforce 42 U.S.C. § 1396a(a)(30)(A), requiring Medicaid payments sufficient to enlist providers); *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) (allowing enforcement of § 1396a(a)(8), requiring "reasonable promptness" of medical assistance). But none of these decisions challenge the well-accepted holding that the Eleventh Amendment is not a bar to *Ex parte Young* cases for prospective relief. Petitioners identify no conflict in the circuits on these issues, and their arguments fail on the merits in any event.

The Fourth Circuit addressed and rejected each of the seven reasons asserted by the North Carolina officials for not applying the *Ex parte Young* exception to Eleventh Amendment immunity. The Petition for Certiorari contains exposition regarding each of the reasons advanced below but appears to claim reversible error on only two grounds.[1]

1. The Petition mentions that an order to "spend more money" goes beyond *Ex parte Young*. Pet. at 12. But in this case, the Fourth Circuit correctly held that the issue is not whether the state has to pay money but whether the relief is retrospective or prospective and that the relief requested in this case is clearly prospective. Pet. App. at 8a-10a (citing *Milliken v. Bradley*, 433 U.S. 267 (1997); *Edelman v. Jordan*, 415 U.S. 651 (1974)).

First, the petitioners attack the Fourth Circuit's decision finding "no merit" to the argument that Congress provided a remedial scheme in the Medicaid Act that displaces any *Ex parte Young* action. Simply reading the opinion dispels the petitioners' argument, Pet. at 11, that the Fourth Circuit erroneously applied the test from *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990). Rather, the Fourth Circuit properly articulated the correct test when it applied *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). The Circuit Court cites *Wilder* as an analogous case in which the Court had concluded that the Medicaid Act did not contain a comprehensive remedial scheme. *See* Pet. App. at 18a-19a. *See also Md. Psychiatric Soc'y v. Wasserman*, 102 F.3d 717, 719 (4th Cir. 1996) (rejecting the argument that the Medicaid Act has a detailed remedial scheme evidencing congressional intent to foreclose *Ex parte Young* actions).

Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002), confirms that the decision below was the correct one. Applying *Seminole Tribe*, *Verizon* asks whether the limitations on judicial remedies, if any, imposed by the underlying statute sought to be enforced foreclose judicial remedies available under *Ex parte Young*. The Medicaid Act provision cited by the petitioners, 42 U.S.C. § 1396c, does not establish any limitations on judicial remedies or even address the federal court's authority. Every circuit court that has looked at whether the Medicaid Act contains a remedial scheme that meets the *Seminole Tribe* standard has agreed with the Fourth Circuit that it does not. *See Frazar v. Gilbert*, 300 F.3d 530, 550-51 (5th Cir. 2002);[2] *Westside Mothers v.*

2. Petitioners misstate the holding of *Frazar*. The *Frazar* court held neither that "EPSDT creates no federal rights," Pet. at 6, nor that "it cannot be the basis for an action under the *Ex parte Young* (Cont'd)

Haveman, 289 F.3d 852 (6th Cir. 2002), *Lewis v. N.M. Dep't of Health*, 261 F.3d 970 (10th Cir. 2001). The Petitioners cite *Joseph A. ex rel. Wolfe v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), in support of their argument, but that case was withdrawn and vacated by the substituted opinion published at 275 F.3d 1253 (10th Cir. 2002) (holding that the funding termination provisions of Title IV-E of the Social Security Act did not create a detailed remedial scheme that supplants *Ex parte Young*). *See also Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1037-40 (8th Cir. 2002) (same).

Second, the Petition claims that the Fourth Circuit erred when it rejected the State officials' argument that the Medicaid Act, as Spending Clause legislation, is not "supreme" federal law but rather a contract that lacks the power of compulsion. Pet. at 13a-14a. However, the Fourth Circuit properly applied long-standing Supreme Court precedent to reach its conclusion. *See* Pet. at 13a-14a (citing *Harris v. McRae*, 448 U.S. 297, 301 (1980); *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474, 478 (1996)). *See also Bennett v. Kentucky Dep't of Education*, 470 U.S. 656, 669 (1985) ("Unlike normal contractual undertakings, federal grant programs originate in and remain governed by statutory provisions expressing the judgment of Congress concerning desirable public policy."). Moreover, there is no circuit split on this point as every court hearing this argument

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(Cont'd)
doctrine." *Id.* That court recognized that EPSDT provisions might create judicially enforceable rights but held that provisions of the consent decree enforced by the district court went beyond what was necessary to provide a remedy for violation of such rights. Whether or not the *Frazar* court's holding regarding a district court's jurisdiction to enforce a consent decree is correct, that holding raises no conflict with the Fourth Circuit's decision here.

has rejected it. *See Frazar v. Gilbert*, 300 F.3d 530, 550 (5th Cir. 2002); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034 (8th Cir. 2002). *See also Elizabeth Blackwell Health Center for Women v. Knoll*, 61 F.3d 170, 178 (3d Cir. 1995) ("[t]he Supremacy Clause requires invalidation of any state constitutional or statutory provision that conflicts with federal law and compels compliance by participants in Title XIX federal aid programs with federal law and regulations"); *Pharmaceutical Research and Mfrs. of Am. v. Concannon*, 249 F.3d 66, 75 (1st Cir. 2001) (considering whether state statute conflicted with Medicaid so as to be invalid under Supremacy Clause); *Concourse Rehab. & Nursing Center, Inc. v. Whalen*, 249 F.3d 136, 146 (2d Cir. 2001) (same); *Lewis v. Hegstrom*, 767 F.2d 1371, 1375 (9th Cir. 1985) (it is a "settled proposition that state regulations which are inconsistent with federal [Medicaid] law are invalid under the Supremacy Clause"); *Randall v. Lukhard*, 729 F.2d 966 (4th Cir. 1984) (en banc) (adopting holding from *Randall v. Lukhard*, 709 F.2d 257, 264 (1983), that state rule was invalid because it conflicted with the Medicaid Act); *Hern v. Beye*, 57 F.3d 906, 913 n.6 (10th Cir. 1995) (affirming injunction prohibiting enforcement of state law "to the extent it conflicts with federal Medicaid law"); *Hodgson v. Board of County Commissioners*, 614 F.2d 601, 611 (8th Cir. 1980) (state law is "inconsistent with and superseded by Title XIX"); *Hope Medical Group for Women v. Edwards*, 63 F.3d 418, 428 (5th Cir. 1995) (affirming injunction prohibiting enforcement of state law conflicting with Medicaid); *Zbaraz v. Quern*, 596 F.2d 196, 202 (7th Cir. 1979) (remanding with instructions to enjoin enforcement of state law to extent it conflicted with Medicaid). *See also Barnes v. Gorman*, 122 S. Ct. 2097, 2102 n.2 (2002) ("We do not imply, for

example, that suits under Spending Clause legislation are suits in contract, or that contract-law principles apply to all issues that they raise.")

II. PETITIONERS' EFFORT TO EXPAND THE SCOPE OF THEIR ELEVENTH AMENDMENT INTERLOCUTORY APPEAL IDENTIFIES NO SPLIT IN THE CIRCUITS AND IS FORECLOSED BY THIS COURT'S PRECEDENT.

Congress and this Court have established the process for appeal of lower court decisions. In general, appeals lie only from a final judgment. 28 U.S.C. § 1292. Interlocutory appeals are permissible in certain limited situations. 28 U.S.C. §§ 1292(a), 1292(f). The Rule 12(b)(6) grounds on which the State officials supported their motion to dismiss the Complaint meet none of the exceptions. 28 U.S.C. § 1292(b) gives the district courts circumscribed authority to certify interlocutory orders for immediate appeal if deemed pivotal by the district court. Here, the district court, in its discretion, refused certification of the Rule 12(b)(6) matters. Pet. App. at 37a.

The State officials did not appeal the certification order. Rather, they petitioned the Circuit Court to exercise pendant jurisdiction over the Rule 12(b)(6) issues under the collateral order doctrine. The Fourth Circuit properly applied *Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995) to reject the request summarily, finding that the other issues in this case are neither "inextricably intertwined" with the Eleventh Amendment immunity claims nor "necessary to ensure meaningful review of the . . . immunity question." Pet. App. at 20a. The Petition offers no compelling reason for disturbing the Circuit Court's ruling, and it is entirely

consistent with this Court's previous instruction. *See Swint*, 514 U.S. at 45 ("If courts of appeal had discretion to append a *Cohen*-authorized appeal from a collateral order further rulings of a kind neither independently appealable nor certified by the district court, then the two-tiered arrangement § 1292(b) mandates would be severely undermined."); *Id.* at 48 ("The procedure Congress ordered for such changes [expansions of the list of orders appealable on an interlocutory basis], however, is not expansion by court decision, but by rulemaking under § 2072.")

Indeed, the arguments require application of different legal principles. The petitioners' sovereign immunity claim, based on Fed. R. Civ. P. 12(b)(1), is decided under different standards than a Rule 12(b)(6) motion. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction."). *See also Lewis v. N.M. Dep't of Health*, 261 F.3d. 970, 979 (10th Cir. 2001)

> [W]hether the plaintiffs have failed to state a [Medicaid Act] claim upon which relief may be granted is not inextricably intertwined with our jurisdictional analysis under *Ex parte Young* and the Eleventh Amendment. Simply stated, Rule 12(b)(6) and the *Ex parte Young* doctrine are two distinct inquiries requiring the application of different standards.

Petitioners do not directly challenge the Fourth Circuit's application of *Swint*. Instead, they make a novel argument that was not presented to the court of appeals. They contend that the merits of a plaintiff's underlying claims are always

inextricably intertwined with the question of federal jurisdiction under *Ex parte Young*. The logic of their argument is as follows: *Ex parte Young* is available only where necessary to stop an ongoing violation of federal law; where the plaintiff's claim of a violation of federal law fails on the merits, there is accordingly no basis for federal jurisdiction under *Ex parte Young*.

Petitioners' argument — which has not been adopted by any court of appeals — ignores the fundamental difference, long recognized by this Court, between questions of jurisdiction and questions of the validity of a cause of action. *See, e.g., Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). Just last Term, this Court rejected a virtually identical argument by a state defendant and held that "[t]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon*, 122 S. Ct. at 1761. *Verizon* is dispositive of petitioners' claim. And the rule could hardly be otherwise: If a district court must satisfy itself that the plaintiff has a good cause of action in order to have *jurisdiction* under *Ex parte Young*, then *any* denial of a 12(b)(6) motion by a state defendant necessarily raises an Eleventh Amendment issue that will be subject to review on an interlocutory appeal.

Nor is there any split in the circuits on this issue. The petitioners erroneously argue that there is a split between the Fourth Circuit (*Antrican*) and Sixth Circuit (*Westside Mothers*), on the one hand, and the Fifth Circuit (*Frazar*), on the other. However, there is no split because *Frazar* does not support the petitioners' argument. If *Frazar* were applying the test recommended by the State officials, the Fifth Circuit would not have reached, and subsequently rejected, the sovereign immunity arguments. Rather, the Fifth Circuit has

expressly required questions of Eleventh Amendment sovereign immunity to be confronted first and, only if no bar is found, will the judicial power of the court be employed to interpret statutory text. *See, e.g., United States of America ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279, 285-88 (5th Cir. 1999).

III. THE PETITION INCLUDES QUESTIONS THAT WERE NOT PRESENTED TO THE COURTS BELOW AND THAT SHOULD NOT BE DECIDED ON FIRST IMPRESSION BY THIS COURT.

The Petition raises for the first time a number of questions regarding the enforceability of the provisions cited in the Complaint.[3] They argue, first, that *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002), created a split with the Fourth Circuit on the question of whether one of the claims, involving the Medicaid Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provisions, can be enforced pursuant to § 1983. Pet. at 8. There is no split. The Fourth Circuit specifically refused to rule on this question, finding it was not "inextricably intertwined" with the sovereign immunity issues. Pet. App. at 20a.

Furthermore, the holding in *Frazar* does not support the petitioners' argument. *Frazar* held that violation of a consent decree does not suffice to confer *Ex parte Young* jurisdiction;

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3. There is no record on these issues, and deciding them now raises the danger of this Court issuing a decision that is based on inaccuracies. For example, the Petition cites two Medicaid Act provisions as unenforceable by the plaintiffs, 42 U.S.C. § 1396c(2) and the EPSDT participation goals of § 1396d(r). Pet. at 18-19. However, the plaintiffs in this case are not seeking to enforce either of these provisions.

rather, the plaintiff must allege that violation of the consent decree also violates some independent prohibition of federal law. And by the conclusion of the proceeding, the court must find an actual violation of federal law or it cannot enforce an injunction. In *Frazar*, after development of a full evidentiary record, the district court tried to enforce an injunction without finding such a violation. *Antrican* does not involve the propriety of a district court's ultimate enforcement of an injunction but rather involves the question whether the district court's jurisdiction depends *ab initio* on whether the plaintiffs can show that they have a good cause of action. As the Court made clear in *Verizon*, the district court's jurisdiction depends on whether the complaint alleges an ongoing violation of federal law and seeks prospective relief, and this determination does not include an analysis of the merits of the claim. 122 S. Ct. at 1761.

Second, the Petition asks the Court to apply the holding of *Gonzaga University v. Doe*, 122 S. Ct. 2268 (2002), to find that none of the statutory provisions at issue in this case are enforceable under § 1983. Pet. at 17-18. Neither the Fourth Circuit nor the District Court decided these questions. The State officials' Rule 12(b)(6) motion to dismiss the case as unenforceable under § 1983, citing *Gonzaga*, is now pending before the District Court. This Court should allow the lower courts the first opportunity to resolve these disputes raised by the State officials' contentions.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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No. 02-220

IN THE

Supreme Court of the United States

CARMEN HOOKER ODOM, Secretary of the North Carolina Department of Health and Human Services, *ET. AL.*,

Petitioners,

v.

SAMUEL ANTRICAN, minor; ALANA ANTRICAN, minor, by their next friend Angela Antrican, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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This petition clearly warrants review. The States have a strong interest in the resolution of both the broad and the particular issues arising out of the decision below. Whether 42 U.S.C. § 1983 may be used to overcome Eleventh Amendment immunity for statutory claims without any judicial determination that individually enforceable federal rights are at issue is a question that can only be settled by this Court.

I. IN GENERAL, FOR CLAIMS OF STATUTORY VIOLATIONS BROUGHT PURSUANT TO § 1983, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER JURISDICTION UNDER *EX PARTE YOUNG* CAN BE DETERMINED WITHOUT FIRST DETERMINING THAT THE STATUTE AT ISSUE CREATES ENFORCEABLE RIGHTS.

Respondent[1] appears not to appreciate that *Frazar v. Gilbert*, 300 F.3d 530 (5th Cir. 2002) is a *jurisdictional* decision. The decision is based upon limitations on the jurisdiction of federal courts under the Eleventh Amendment. It was precisely because the state defendants in *Frazar* argued the district court's enforcement of a consent decree ran afoul of the Eleventh Amendment that the Fifth Circuit had appellate jurisdiction.

The court's *holdings* were jurisdictional: "We vacate the orders because the court has exceeded its jurisdiction," *id.*

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[1] Only respondent Arielle McCree remains a plaintiff below. All other respondents have been dismissed.

at 533; "[W]e hold that the court lacks jurisdiction to cure the problems or to direct the particular means and methods of this care," *id.*; "The district court's authority to enforce the consent decree is further limited by the Eleventh Amendment," *id.* at 540; and "The Eleventh Amendment limits that jurisdiction to the enforcement of federal rights," *id.* at 543.

The *Frazar* decision, completely at odds with the Fourth Circuit decision below, unmistakably decides that federal courts lacks jurisdiction over a claim of a statutory violation brought under § 1983 unless the federal statute at issue creates enforceable rights:

> In short, so far as we can tell from this record, plaintiffs have not established any violations of the EPSDT provisions of the Medicaid statute which are actionable under § 1983 and the Ex Parte Young exception to the Eleventh Amendment.

Id. at 548.

Respondent errs in thinking this is a "merits" issue resolved against petitioners in *Verizon Maryland Inc. v. Public Service Comm'n of Maryland*, 122 S. Ct. 1753 (2002). In *Verizon* this Court sustained federal jurisdiction because the question was whether a state commission's order was pre-empted by federal law. That is a far different question than whether a federal statute creates personal rights enforceable against state officials.

Moreover, *Verizon's* comment that inquiries into whether actions lie under *Ex parte Young* do not include analyses of the merits of the underlying claims, *id.* at 1761, responded to a suggestion that the commission's order may not have been inconsistent with federal law at all. *Verizon* might well resolve the present petition if petitioners simply argued that respondent's allegations do not amount to a violation of a federal statutory requirement. If that were the sole allegation, then *Verizon* teaches that ordinarily the merits of the underlying claims are ignored in making jurisdictional determinations under *Ex parte Young*.

However, petitioners' contention herein is quite different. Petitioners contend, consistent with the Fifth Circuit's decision in *Frazar*, that whether a federal statute creates enforceable rights - which is *not* an inquiry into the merits of whether state officials have violated the alleged rights - is necessarily a part of the jurisdictional inquiry under *Ex parte Young*.

The basis for this contention is, of course, the fact that the *Ex parte Young* fiction exists solely to constitutionally accommodate the tension between the supremacy of federal law and Eleventh Amendment immunity. The only legitimate basis for federal court jurisdiction over state officials in their official capacities, consistent with the Eleventh Amendment, is the vindication of federal rights. *Frazar*, 300 F.3d at 541 (quoting *Lelsz v. Kavanagh*, 807 F.2d 1243, 1252 (5th Cir. 1987).

Contrary to respondent's remarks in her Brief in Opposition, there is a definite conflict between the decision

below and that in *Frazar*. Further, it is a conflict about a fundamental issue of federal jurisdiction which this Court should resolve.

II. IN PARTICULAR, FOR CLAIMS OF MEDICAID EPSDT VIOLATIONS BROUGHT PURSUANT TO § 1983, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO WHETHER A CLAIM BASED UPON LACK OF "EFFECTIVE" INFORMING ABOUT EPSDT IS JUSTICIABLE UNDER *EX PARTE YOUNG*.

Respondent alleges in her complaint that her federal rights are being violated because petitioners do not "inform effectively" eligible persons about EPSDT availability. The court below found federal jurisdiction under *Ex parte Young* to litigate that claim.

Quite to the contrary, *Frazar* determined that EPSDT provisions generally do not create federal rights. The court's logic is as follows: Congress did not intend for a federal court to require that a state participating in the Medicaid program must always provide every EPSDT service to every eligible person at all times. *Id.* at 544. Congress limited the success required from various EPSDT provisions to meeting the performance standards set by the federal Secretary. *Id.* at 546. Therefore private parties cannot sue under § 1983 to require a state to meet such EPSDT participation or performance standards, because state compliance with such standards is not an individual right actionable under § 1983. *Id.* at 545 (citing *Blessing* v. *Freestone*, 520 U.S. 329, 343-44 (1997)).

More particularly, *Frazar* observed that nothing in the EPSDT statute expressly requires the "effective" conveyance of information. The absence of such a statutory requirement, coupled with the fact that the degree of success required of a

state's information efforts is within the performance standards set by the Secretary, led the court to conclude that the district court lacked jurisdiction to enforce an "effective" information standard against state officials. *Id.* at 546.

To say there is no conflict among the circuits on this question when the lack of "effective" information is precisely among the claims left intact by the decision below is highly erroneous.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition itself, this Court should grant the petition for writ of *certiorari.*

Respectfully submitted,

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